Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,
Petitioner,

vs.

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Did the Court of Appeals err in permitting federal intrusion into an ongoing State bar disciplinary proceeding which involves the extremely delicate and unique relationship between a State court and the attorneys practicing before it and which provides an ample forum for the resolution of all issues including federal constitutional issues?

2. Is a State bar disciplinary proceeding a "pending State action," as contemplated by the *Younger* doctrine of non-interference, when the matter is before an Ethics Committee established by the Supreme Court of New Jersey to assist it in adjudicating possible infractions of the disciplinary rules and when the Supreme Court has full control over such proceedings?

3. Is the Supreme Court of New Jersey a competent State tribunal to adjudicate the constitutionality of Disciplinary Rules adopted by it?

4. Did the Court of Appeals err in failing to construe the New Jersey Court Rules as those rules have been construed by the Supreme Court of New Jersey?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 24, 1981 and on May 12, 1981.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 643 F.2d 119 (3rd Cir. 1981) and is appended hereto as Appendix A. The opinion sur petition for rehearing of the United States Court of Appeals for the Third Circuit, not yet reported, together with order amending opinion sur petition for rehearing, are included as Appendix B. The judgment of the United States Court of Appeals for the Third Circuit in this case appears as Appendix C. The unreported opinions of the United States District Court appear as Appendix D and Appendix E.

Jurisdiction

The opinion of the United States Court of Appeals for the Third Circuit was filed on February 24, 1981. A timely petition for a rehearing was denied and an opinion sur petition for rehearing was filed on May 12, 1981. The judgment of the United States Court of Appeals for the Third Circuit was issued on May 20, 1981. By order of Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, entered on July 31, 1981, the time to file the petition for writ of certiorari in this matter was extended from August 10, 1981 to and including September 9, 1981. This petition for writ of certiorari was filed in accordance with the order of Associate Justice Brennan. The jurisdiction of this Court is therefore invoked under 28 U.S.C. § 1254(1) to review a judgment of the Court of Appeals by issuance of a writ of certiorari.

Regulatory Provisions Involved

This matter involves two disciplinary rules adopted by the Supreme Court of New Jersey to govern the conduct of attorneys admitted to practice before it. DR1-102(A)(5) prohibits an attorney from engaging in conduct which is "prejudicial to the administration of justice" while DR7-107(D) provides:

> "During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that he expects to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case."

Also implicated in this case is New Jersey Court Rule 1:20 which establishes the procedures to be followed in disciplining attorneys admitted to practice in the State of New Jersey.

Statement of the Case

This petition involves intervention by a federal court in an ongoing State bar disciplinary proceeding against an attorney admitted to practice in the State of New Jersey.

The case has its origins in the criminal trial of Joanne Chesimard (also known as Assata Shakur) who was charged with the murder of a New Jersey State Trooper.

While jury selection for the Chesimard trial was in progress, Lennox Hinds, a New Jersey attorney, called a press conference concerning the conduct of the trial and more specifically that of the trial judge, Honorable Theodore Appleby. A newspaper article which appeared in the *New York Daily News* on January 21, 1977 reported:

> ". . . Lenox [sic] Hinds, an attorney also representing Mrs. Chesimard, said the defense team wanted the case moved to another court because in New Brunswick, '*what we are seeing is legalized lynching.*'
>
> "He [Hinds] said he was speaking for the defense team because its members were 'gagged' by Judge Appleby whom he [Hinds] accused of asking prospective jurors self-serving questions which he [Hinds] said were leading to *the creation of a hangman's court.*'" (Emphasis added) (Pa244)*

An article which appeared in the *Newark Star-Ledger,* on the same date, reported that Lennox Hinds had "called the state proceeding 'a travesty'" and that he "charged that Superior Court Judge Theodore Appleby 'does not have the judicial temperament or the racial sensitivity to sit as an impartial judge in the Chesimard trial'" (Pa245) (App. A at 3a to 4a).

These newspaper articles were brought to the attention of the Middlesex County Ethics Committee by Robert M. Foley, one of its members, who was thereafter directed

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* Pa — refers to the appendix filed by plaintiffs in the proceeding below.

by the Committee to investigate the matter.* Accordingly, on February 24, 1977, Mr. Foley wrote to Lennox Hinds stating that he had been assigned to investigate the circumstances surrounding the January 20, 1977 press conference and was seeking a conference with Mr. Hinds at a convenient date and place to discuss the matter (Pa246). Although Mr. Hinds refused to cooperate with the investigation, he did publicly release the initial communication from Mr. Foley which was generally reported in the local press. Fearing additional publicity which could adversely affect the Chesimard trial, the investigation was stayed pending the trial's completion (Pa256).

Following the Chesimard trial, the investigation was reactivated and again Mr. Hinds refused to meet with Mr. Foley. The investigation was, therefore, conducted without his cooperation. Upon its completion, Mr. Foley submitted a Report to the Committee in which he concluded that the public statements made by Mr. Hinds were prejudicial to the administration of justice and, as such, violative of DR1-102(A)(5). He further found that these statements, made by an attorney allegedly speaking for the defense team during the jury selection process in the Chesimard criminal trial, were "reasonably likely to in-

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* At the time the *Hinds* matter arose, an Ethics Committee was established in each of the 21 counties in New Jersey. The Middlesex County Ethics Committee had jurisdiction to investigate the *Hinds* matter since both the Chesimard trial and Mr. Hinds' law office were located in the City of New Brunswick in Middlesex County. Following the revision of the New Jersey Court Rule governing attorney disciplinary proceedings, the 21 county ethics committees were consolidated into 12 district ethics committees. Each district corresponds to the vicinage of the 12 assignment judges of the Superior Court of New Jersey. The Middlesex County Ethics Committee is now the District VIII Ethics Committee which encompasses Middlesex County.

terfere with a fair trial in that the statements were designed to influence the thinking of prospective jurors." He, therefore, concluded that these statements also violated DR7-107(D). Based upon these findings, Mr. Foley recommended that a statement of charges be prepared and served upon plaintiff Hinds in accordance with N.J. Ct.R. 1:20-2 (b) (Pa250 to Pa251) (App. A at 4a to 5a).

The Middlesex County Ethics Committee accepted the Foley report and charges were served upon plaintiff Lennox Hinds on January 3, 1978 (App. A at 5a). Pursuant to N.J. Ct. R. 1:20-4(e), plaintiff had ten days from date of service in which to file an answer with the committee. Responding to plaintiff's requests, the time to answer was twice extended, the second extended date for filing being March 10, 1978.

However, no answer to these charges was ever submitted by Lennox Hinds. Rather, a complaint was filed in Federal District Court, on February 10, 1978, which sought to enjoin the disciplinary proceeding before the Middlesex County Ethics Committee and to obtain a judgment declaring DR1-102(A)(5) and DR7-107(D) unconstitutional (Pa13).* Since plaintiffs were challenging disci-

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* In addition to Lennox Hinds, plaintiffs in the Federal District Court were three organizations essentially composed of minority attorneys. According to the complaint, these organizations were dedicated to identifying and eradicating racism in America, particularly in its legal and judicial system (Pa4). It was also alleged that the mere filing of the complaint by the Ethics Committee had chilled these attorneys from making such expression as would be necessary to advance "the public's knowledge of the existence of racism within the legal processes of the State of New Jersey" (Pa8 to Pa9). Of course, the confidentiality of New Jersey attorney disciplinary proceedings would normally have protected against such chilling effect which, if it did occur, resulted from Lennox Hinds' breach of the confidentiality of the process when he read, at a press conference, the initial communication from the Middlesex County Ethics Committee.

plinary rules adopted by the Supreme Court of New Jersey, they alleged that they had no realistic remedy within the legal machinery of the State of New Jersey and that "it would be a futile gesture to request the Ethics Committee, which was created by the said Court, *or the said Court itself, to declare its own pronouncement to be unconstitutional.*" (Emphasis added) (Pa10).

Plaintiffs thereafter moved for a preliminary injunction and declaratory relief while defendant moved for dismissal of the complaint or summary judgment. The District Court, on June 6, 1978, granted defendant's motion to dismiss the complaint finding the "principles of comity and federalism dictate that the federal court abstain so that the state is afforded the opportunity to interpret its rules in the face of a constitutional challenge" (App. D at 53a to 54a). In so concluding, the Court rejected plaintiffs' arguments that the Ethics Committee and the Supreme Court of New Jersey were biased tribunals incapable of affording plaintiff, Hinds, a fair and impartial forum in which to challenge the constitutionality of the New Jersey Disciplinary Rules (App. D at 48a to 49a).

Plaintiffs moved, pursuant to R. 59 (e) F.R.C.P., to alter or amend the Judgment of the Court. The district court reopened the case for the limited purpose of permitting plaintiffs to demonstrate, through evidentiary hearing, the degree of bad faith and harassment necessary to operate as an exception to the *Younger* abstention doctrine. Following this decision, extensive discovery was undertaken and two days of hearing were held before the Honorable Clarkson S. Fisher.

On December 13, 1979, the trial judge filed a letter opinion in which he found:

> ". . . that plaintiffs have failed to meet their burden of proof and that the Middlesex County Ethics Com-

> mittee did not act in bad faith or in any way harass Hinds, *but sought only to fulfill its function as agent of the New Jersey Supreme Court* and guardian against infractions of the disciplinary rules.
>
> • • •
>
> ". . . I am satisfied that Hinds will have a full and fair opportunity to address all charges that may be brought against him through the state process.
>
> "There has been no evidence deduced to justify an exception to the *Younger* abstention doctrine." (Emphasis added) (App. E at 57a to 58a.)

Plaintiffs appealed this decision and pursuant to R. 62 (c) F.R.C.P., moved before the trial court for a stay pending appeal.* This relief was granted and an order was entered on April 14, 1980 staying all proceedings by the Ethics Committee pending the disposition of the present appeal.

The United States Court of Appeals, in its majority opinion, concluded that the District Court had abused its discretion when it denied plaintiffs injunctive relief on the grounds that the doctrine of *Younger* v. *Harris* required abstention. The Court of Appeals recognized that "disciplinary proceedings directed against members of the bar are primarily the concern of the state courts." However, it concluded that the predicate for *Younger* abstention—"the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved"—was lacking in the pending State disciplinary proceeding (App. A at 21a).

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* During the pendency of this matter before the trial court, the Ethics Committee had voluntarily stayed its processing of the Hinds disciplinary matter.

The Middlesex County Ethics Committee filed a petition for a rehearing *in banc* which was supported by an Affidavit of Stephen W. Townsend, the Clerk of the Supreme Court of New Jersey. Mr. Townsend stated that the Supreme Court of New Jersey had formally considered the decision of the United States Court of Appeals in this matter at its conference of March 9, 1981. At that time, it was determined to "bring the constitutional claim of Lennox Hinds, Esquire, directly before it. . . . upon notification that its action would not violate the existing stay" (App. F at 60a).

Despite the unqualified opportunity afforded Hinds for the adjudication of his constitutional claims by the Supreme Court of New Jersey, the United States Court of Appeals declined to rehear this matter.* It refused to vacate its judgment on the basis of the Supreme Court action and thereby deprive its judgment of its "precedential value." Indeed, the Court of Appeals was not persuaded that "Hinds could have obtained New Jersey Supreme Court consideration of his constitutional claim when he instituted the federal action . . ." (App. B at 37a).

The Court of Appeals stated, however, in its opinion sur petition for rehearing, that it did not intend that the "New Jersey proceedings should be stayed pending the federal proceedings" (App. B at 36a). The Supreme Court

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* Four of the seven judges who participated in considering the petition would have granted rehearing. The petition was denied, however, (1) since neither of the two judges who concurred in the original majority opinion asked for rehearing and (2) since a majority of the current judges in regular active service did not vote for rehearing in banc. With regard to the latter reason, the opinion indicates that two judges of the circuit court did not participate but failed to disclose the rationale for their non-participation (App. B at 31a).

of New Jersey, therefore, issued an Order on Certification on June 8, 1981, certifying the entire Hinds matter, including the constitutional challenges to DR1-102(A)(5) and DR7-107(D) to it for consideration (App. G). In accordance with the judgment of the United States Court of Appeals, the constitutionality of these disciplinary rules adopted by the Supreme Court of New Jersey, is also presently pending before the Federal District Court (App. C at 44a).

ARGUMENT

The decision of the Court of Appeals, which permitted federal intrusion into an ongoing state bar disciplinary matter thereby disrupting the delicate relationship between the Supreme Court and attorneys licensed to practice before it which is absolutely essential to the sound administration of the judicial system, should be reviewed by this Court since it represents a radical departure from the Abstention Doctrine articulated by this Court in *Younger* v. *Harris*, and its progeny, is in conflict with lower federal court decisions, and may significantly impact on the ability of state courts to establish professional standards and discipline attorneys licensed to practice before them.

In this case, the Court of Appeals has radically departed from the settled policy of federal non-interference in ongoing State bar disciplinary proceedings and has done so on the theory that a meaningful adjudication of the constitutional claims advanced by the federal plaintiff is unavailable within the context of that State proceeding. The decision below is, therefore, an unmistakable signal to New Jersey attorneys that, during the initial stages of any state

disciplinary proceedings which may be brought against them, the federal courts stand ready to enjoin such proceedings while adjudicating their challenges to the disciplinary rules adopted by the Supreme Court of New Jersey. By thus wresting from the State Supreme Court the ability to effectively discipline attorneys licensed to practice before it, this decision defeats the important policies of equity, comity and federalism which form the basis of the abstention doctrine articulated by this Court in *Younger* v. *Harris*, 401 U.S. 37 (1971) and further amplified in *Moore* v. *Sims*, 442 U.S. 415 (1979); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Juidice* v. *Vail*, 430 U.S. 327 (1977) and *Rizzo* v. *Goode*, 423 U.S. 362 (1976). It also conflicts with its own decision in *Gipson* v. *New Jersey Supreme Court*, 558 F.2d 701 (3rd Cir. 1977) and those of other lower federal courts. *Rosenthal* v. *Carr*, 614 F.2d 1219 (9th Cir. 1980), *cert.* den. 447 U.S. 927 (1980); *American Civil Liberties Union* v. *Bozardt*, 539 F.2d 340 (4th Cir. 1976), *cert.* den. 429 U.S. 1022 (1976); *Anonymous* v. *Association of the Bar of the City of New York*, 515 F.2d 427 (2nd Cir. 1975), *cert.* den. 423 U.S. 863 (1975); *Goodrich* v. *Supreme Court of the State of South Dakota*, 511 F.2d 316 (8th Cir. 1975); *Erdmann* v. *Stevens*, 458 F.2d 1205 (2nd Cir. 1972), *cert. den.* 409 U.S. 889 (1972) and *Tepper* v. *State Bar of Wisconsin*, 489 F.Supp. 115 (E.D. Wis. 1980), *aff'd* 636 F.2d 1222 (7th Cir. 1980).

The Court of Appeals introduced, as a basis for federal intervention in an ongoing State disciplinary proceeding, the erroneous construct that a matter pending before an Ethics Committee is not pending before the State Court for abstention purposes. Even the court below recognized that this element had not previously been viewed as determinative in considering the appropriateness of abstention in State bar disciplinary proceedings (App. A at 15a). In

reaching this determination, the Court of Appeals misinterpreted the court rules governing attorney disciplinary proceedings adopted by the Supreme Court of New Jersey. Indeed, even when presented with the Supreme Court's decision to directly adjudicate the constitutional claims of Lennox Hinds, the Court of Appeals refused to vacate its judgment since it was not convinced "that Hinds could have obtained New Jersey Supreme Court consideration of his constitutional claim when he initiated the federal action" (App. B at 37a). This decision therefore establishes, as the predicate for *Younger* abstention in State bar disciplinary proceedings, the opportunity for immediate adjudication of the federal plaintiff's constitutional claims by the State Supreme Court. Furthermore, the Court of Appeals, in refusing to permit the Supreme Court of New Jersey to pass upon the constitutionality of its disciplinary rules, free from federal oversight, suggests that the state court lacks objectivity in reviewing the constitutionality of its own rules. The assumption by the Court of Appeals that the Supreme Court of New Jersey is a biased forum to review its disciplinary rules is particularly disruptive to the notion of federalism and comity and has been found totally unacceptable by this Court in *Kugler* v. *Helfant,* 421 U.S. 117 (1975).

Finally, this decision is part of a consistent pattern of Third Circuit opinions which have gradually eroded the *Younger* abstention doctrine until its continued vitality in this circuit is questionable. *New Jersey Philadelphia Presbytery* v. *New Jersey State Board of Higher Education,* —— F. 2d —— (3rd Cir. 1981), reh. den. —— F.2d —— (3rd Cir. 1981); *Phillips* v. *Pennsylvania Higher Education Assistance Authority,* —— F.2d —— (3rd Cir. 1981). See also *New Jersey Education Ass'n* v. *Burke,* 579 F.2d 764 (3rd Cir. 1978) *cert. den.* 439 U.S. 894 (1978).

State bar disciplinary proceedings, which assure the integrity of the legal profession and which provide an ample forum for the resolution of all federal issues, warrant application of the doctrine of federal noninterference articulated in *Younger* v. *Harris*.

In the absence of extraordinary circumstances justifying intrusion, federal courts restrain from taking any action in cases where the federal litigant, in effect, asks the court to interfere with State proceedings. *Younger* v. *Harris, supra; Trainor* v. *Hernandez, supra; Juidice* v. *Vail, supra; Kugler* v. *Helfant, supra.* Although the doctrine of federal non-interference was first articulated with reference to State criminal proceedings, it is recognized as being ". . . fully applicable to civil proceedings in which important state interests are involved." *Moore* v. *Sims, supra,* 442 U.S. at 423. In addition, *Younger* abstention has been applied where injunctive relief was sought, not against the judiciary, but against those "in charge of an executive branch of an agency of state or local governments . . ." *Rizzo* v. *Goode, supra,* 423 U.S. at 380.

Nowhere is unimpaired performance of an important State function more essential than in the area of the ability of a state judiciary to regulate the members of its bar. Indeed, a state's interest in maintaining the integrity of its bar through disciplinary proceedings is closely analogous to a state's interest in assuring a sound judicial system through enforcement of its contempt proceedings. *Juidice* v. *Vail, supra,* 430 U.S. at 335. Accordingly, lower federal courts have consistently followed the *Younger* abstention doctrine and have refrained from interfering with pending State disciplinary proceedings. *Gipson* v. *New Jersey Supreme Court, supra; Rosenthal* v. *Carr, supra; American Civil Liberties Union* v. *Bozardt, supra; Anonymous* v. *Association of the Bar of the City of New York,*

supra; Anonymous J. v. *Bar Association of Erie County,* 515 F.2d 435 (2nd Cir. 1975), *cert.* den. 423 U.S. 840 (1975); *Goodrich* v. *Supreme Court of State of South Dakota, supra; Erdmann* v. *Stevens, supra.* These decisions reflect total agreement among the circuits that it would be particularly disruptive to the special relationship between state courts and members of their bars for federal courts to interfere with or enjoin state bar disciplinary proceedings. This concern was clearly enunciated in *Gipson, supra,* 558 F.2d at 704:

> "The traditional power of the state courts to establish standards for members of their bars and to discipline them . . . suggests that incursions by federal courts into ongoing disciplinary proceedings would be peculiarly disruptive of notions of comity."

See also, *Tepper* v. *State Bar of Wisconsin, supra; Doe* v. *State Bar of California,* 415 F.Supp. 308 (N.D. Cal. 1976), aff'd 582 F.2d 25 (9th Cir. 1978); *Tedesco* v. *O'Sullivan,* 420 F.Supp. 194 (D. Conn. 1976); *Niles* v. *Lowe,* 407 F. Supp. 132 (D. Hawaii 1976).

The decision of the Third Circuit in the present case, however, represents a radical departure from this well established tradition of non-interference with State bar disciplinary proceedings. In reaching its decision, the court below posits a novel basis for justifying federal intrusion into the delicate and unique relationship between a State Court and the attorneys practicing before it. After reviewing the procedures established by the Supreme Court of New Jersey to govern the discipline of New Jersey attorneys, the Court of Appeals concluded that the pendency of a disciplinary matter before the Ethics Committee of the Supreme Court did not constitute the pendency of that matter before the Supreme Court. The court below next

determined that the Ethics Committee would not provide the federal plaintiff, Hinds, with an adequate forum in which to raise his constitutional claims. In reaching this conclusion, the Court of Appeals appears to create a procedural chasm between the Ethics Committee and the Supreme Court which cannot be breached either by way of motion to the Supreme Court or by Order from the Supreme Court to the Committee. The court below, therefore, found that the predicate for *Younger* abstention does not exist, to wit, "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved", and persisted in such finding even when directly advised by the Supreme Court of New Jersey that the opportunity to raise constitutional issues, not only exists, but was being initiated by the court itself in this particular case.

It is abundantly clear, therefore, that in this case neither court rule nor practice barred plaintiff, Hinds, from raising his constitutional challenge to the disciplinary rules within the context of the pending State bar disciplinary proceeding. *Moore* v. *Sims, supra,* 442 U.S. at 425-6. With regard to these proceedings, the Supreme Court of New Jersey has been vested, by express provision of the New Jersey Constitution, with complete jurisdiction not only over admission to the practice of law but also over the discipline of persons so admitted. *N.J. Const.*, Art. VI, §2, ¶3. To assist in the discharge of this function, the Supreme Court established, by court rule, district ethics committees.

> *"These committees are agents of the Supreme Court.* It is the Supreme Court which in the final analysis makes the factual findings, draws the legal conclusions and determines the appropriate discipline." (Emphasis added) *In re Logan,* 70 N.J. 222, 225, 358 A.2d 787 (1976).

Indeed, the nature of the relationship between the former county ethics committees and the Supreme Court was articulated by *Toft* v. *Ketchum*, 18 N.J. 280, 284, 113 A.2d 671 (1955) *cert.* den. 350 U.S. 887 (1955).

> ". . . the filing of a complaint with one of our ethics and grievance committees is in effect a filing with the Supreme Court, in which alone the power to discipline attorneys at law in New Jersey resides. . . . The several county ethics and grievance committees established under our rules of court . . . are arms of the court which perform the very important functions of receiving complaints, investigating them, holding hearings, on them, and then presenting their findings to the court. *The Supreme Court, however, has at all time full control over the proceedings. . . . From the very beginning a disciplinary proceeding is judicial in nature, initated by filing a complaint with an ethics and grievance committee.*" (Emphasis added)

The Supreme Court of New Jersey has unhesitatingly undertaken an examination of its rules where valid challenges to their need or viability have arisen within the context of disciplinary proceedings as when such challenges have been brought in other procedural settings. *See In the Matter of the Application of Philip J. LiVolsi,* —— N.J. ——, —— A.2d —— (1981) (review of constitutionality and desirabilty of Fee Arbitration Committees, N.J. Ct. R. 1:20A-1 *et seq.*, requiring arbitration of attorney fee disputes upon a client's request (whether the lawyer consents or not) or upon a lawyer's request if the client consents; constitutionality of procedures upheld; need for amendment of rules to provide for limited right of appeal acknowledged); *American Trial Lawyers* v. *N.J. Supreme Court*, 66 N.J. 258, 330 A.2d 350 (1974) (constitutionality of rule establishing graduated schedule of maximum con-

tingent fees for tort litigation upheld); *In re NBC*, 64 N.J. 476, 317 A.2d 695 (1974) (Canon of Judicial Ethics barring courtroom sketches during court sessions or recesses modified). As the State Supreme Court has recognized:

> "Our rules are never immutable. Applications for their review are never foreclosed [for] . . . [t]he Court does not adopt its rules to promote or brook injustice but, as best it can, to secure justice . . ." *American Trial Lawyers* v. *N.J. Supreme Court, supra*, 66 N.J. at 267, 330 A.2d at 355.

Indeed, following the decision below, the Supreme Court formalized its practice whereby constitutional issues could be raised within the context of disciplinary proceedings.*

Accordingly, if plaintiff Hinds had submitted a formal answer to the charges filed against him, pursuant to New Jersey Court Rule, he could have challenged the constitutionality of the disciplinary rules under which has was

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* Effective September 14, 1981, N.J. Ct. R. 1:20-2(j) requires that constitutional challenges to disciplinary proceedings are to be set forth in the answer to the complaint. All constitutional challenges, raised either before the Ethics Committee or before the Disciplinary Review Board, are to "be withheld for consideration by the Supreme Court as part of its review of the final decision of the Disciplinary Review Board." However, N.J. Ct. R. 1:20-4(d)(i) specifically provides:

> *"An aggrieved party may file a motion for leave to appeal with the Supreme Court to seek interlocutory review of a constitutional challenge to proceedings pending before the District Ethics Committee or the Disciplinary Review Board.* The motion papers shall conform to R. 2:8-1. Leave to appeal may be granted only when necessary to prevent irreparable injury. If leave to appeal is granted, the record below may, in the discretion of the Court, be supplemented by the filing of briefs and oral argument." (Emphasis added)

charged. N.J. Ct. R. 1:20-4(c); 1:20-2(j).* Clearly, nothing in the rules governing attorney discipline precluded such defense. Furthermore, Mr. Hinds could have moved the Supreme Court of New Jersey to directly adjudicate his constitutional claim. *See Gipson* v. *New Jersey Supreme Court, supra,* (the Supreme Court of New Jersey entertained and decided procedural motions stemming from the disciplinary matter pending against Gipson before the Union County Ethics Committee); *In re Logan, supra,* (the Supreme Court of New Jersey considered a motion to dismiss disciplinary charges on the basis that the disciplinary rules did not provide a "fair or meaningful hearing" as required by due process.) *See also In the Matter of the Application of Philip J. LiVolsi, supra.* Plaintiff Hinds, however, filed no answer raising his constitutional claims before the Ethics Committee nor did he move the Supreme Court of New Jersey to directly adjudicate his challenges to its disciplinary rules. Rather than avail himself of these opportunities accorded him within the

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* Central to the Third Circuit's decision was the conclusion that the constitutional claims of plaintiff Hinds could not be adjudicated by the Ethics Committee. Quite apart from the fact that plaintiff could have moved the Supreme Court to directly adjudicate these claims, had he chosen to do so, the *Younger* doctrine simply does not require the immediate review of constitutional claims by the State Supreme Court. What is required is the opportunity *to raise* the constitutional claims within the pending State proceeding. *Juidice* v. *Vail, supra; Huffman* v. *Pursue,* 420 U.S. 592 (1975). Indeed, the plaintiffs never alleged before the trial court that their constitutional claims could not be raised and timely adjudicated within the State bar disciplinary matter. Rather, following the decision in *Gibson* v. *Berryhill,* 411 U.S. 564 (1973), they contended that both the Ethics Committee and the Supreme Court of New Jersey would constitute a *biased forum* in which to adjudicate the constitutionality of the disciplinary rules adopted by the Supreme Court of New Jersey (Pa10).

State proceeding, the plaintiffs brought suit in Federal District Court to enjoin that State proceeding and to obtain a judgment declaring DR1-102(A)(5) and DR7-107 (D) unconstitutional.

Although the predicate for *Younger* abstention clearly existed in the present case, to wit—the opportunity to fairly pursue constitutional claims within a pending State proceeding—plaintiff knowingly chose not to avail himself of that opportunity.* As has been found by this

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* The Third Circuit, in straining to support its decision, suggests that *Younger* abstention does not apply since the disciplinary proceeding against Hinds had not yet reached its adjudicative stage (App. A at 16a to 20a). This contention is simply not supported by the record in this case. After the receipt of the initial complaint against Hinds, the Ethics Committee appointed one of its members to investigate the matter. The Committee member, upon completing his investigation, submitted a report to the full Committee. After carefully considering this report, the Committee voted to formally file charges against Lennox Hinds and a Statement of Charges was thereupon issued and served. The adjudicative phase of the bar disciplinary proceeding, therefore, commenced with issuance and service of these charges. *Toft* v. *Ketchum, supra.* It is also suggested below that *Younger* abstention should not be applied since State bar disciplinary matters are administrative proceedings (App. A at 16a to 17a). The Supreme Court of New Jersey, however, has declared that these proceedings are judicial and not administrative in nature. *Toft* v. *Ketchum, supra.* However, even if State bar disciplinary matters may be properly characterized as quasi-judicial administrative proceedings, the decisions of this Court clearly support the application of the principles of federalism to such proceedings. *Geiger* v. *Jenkins,* 401 U.S. 985 (1971). Indeed, although this Court denied deference to a State administrative proceeding in *Gibson* v. *Berryhill, supra,* it did so, not because of the nature of the proceeding, but because the administrative tribunal was tainted with bias and therefore incapable of adjudicating the issues before it.

Court, the "failure" to take advantage of the opportunities afforded in the State proceeding in no way suggests the inadequacy of those procedures. *Juidice* v. *Vail, supra,* 430 U.S. at 337; *Trainor* v. *Hernandez, supra.* Nor can such choice bar the Supreme Court of New Jersey from reviewing, in the first instance and free from federal interference, the constitutionality of the disciplinary rules which it has adopted to govern the conduct of all attorneys admitted to practice before it. Yet the decision below is a clear signal to attorneys in the Third Circuit that they may successfully adjudicate challenges to State disciplinary rules, within the federal system, by simply declining to participate in the State disciplinary proceeding. This decision, which defeats the important notions of equity, comity and federalism underlying the *Younger* abstention doctrine and which disrupts the delicate relationship between a State court and its bar, warrants review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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On the Petition.

[APPENDICES FOLLOW]

Appendix

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1224

GARDEN STATE Bar Association and THE NEW JERSEY ASSOCIATION of Black Women Lawyers, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,

Appellants

v.

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey

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ON APPEAL FROM THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 78-0273)

Argued September 16, 1980

Before: ADAMS, WEIS, and SLOVITER, *Circuit Judges*

(Opinion filed February 24, 1981)

Appendix A

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*

I.

Lennox S. Hinds, a New Jersey attorney, was served by the Middlesex County Ethics Committee with

a formal statement of charges arising out of comments made by Hinds in a press conference during the jury selection phase of a criminal trial. The charges initiated disciplinary proceedings. Hinds and three plaintiff organizations[1] filed suit in federal district court against the Ethics Committee seeking an injunction against those disciplinary proceedings and a declaratory judgment that the disciplinary rules under which Hinds had been charged are unconstitutional. The district court granted the defendant's motion to dismiss on the grounds that abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), was required in deference to an ongoing state proceeding. We find abstention inappropriate because the proceeding before the Ethics Committee fails to guarantee to Hinds an adequate opportunity to make his constitutional arguments.

II.

The events began with the publication of two newspaper articles in January 1977 which described a press conference held in connection with the criminal trial of Joanne Chesimard, then underway in state court. They reported that Hinds made statements highly critical of the trial judge's judicial temperament and racial sensitivity, of the jury selection process, and of the other conditions under which the trial was being conducted. Among the statements attributed to Hinds were references to the state court proceeding as "a travesty", "legalized lynching", and "a kangaroo court." One article referred to Hinds as "one of Joanne Chesimard's lawyers." The other article identified Hinds as executive director of the National Conference of Black Lawyers. It

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1. Plaintiff organizations are the National Conference of Black Lawyers, The Garden State Bar Association, and the New Jersey Association of Black Women Lawyers. The latter two organizations function primarily within the State of New Jersey.

stated accurately that Hinds had represented Joanne Chesimard "in a separate federal civil suit challenging the conditions of her isolation cell confinement in the Middlesex County Jail but is not a member of the five-lawyer defense team" in the criminal trial.

Although there were no complaints to the Ethics Committee about Hinds' alleged statements, these articles were submitted to the Ethics Committee by one of its members, David M. Foley, acting on his own initiative. In February 1977 the Ethics Committee directed Foley to investigate the statements reported to have been made by Hinds. After Hinds released the contents of a letter to him from Foley about the pending Ethics Committee's investigation, the Ethics Committee voluntarily suspended the investigation until the conclusion of the Chesimard trial. Thereafter Foley resumed his investigation and reported to the Ethics Committee his conclusion that Hinds' statements violated DR 1-102(A)(5) and DR 7-107(D) of the Code of Professional Responsibility. Those rules state in pertinent part:

> DR 1-102 *Misconduct*
> (A) A lawyer shall not:
> ****
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> DR 7-107 *Trial Publicity*
> ****
> (D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that he expects to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial. . . .

Foley recommended that a statement of charges be prepared and served upon Hinds. The Ethics Committee accepted the recommendation and voted to prepare a formal statement of charges against Hinds, which was served on Hinds on January 3, 1978.

Instead of filing an answer to the charges pursuant to the New Jersey procedure for bar disciplinary proceedings, Hinds and the plaintiff organizations filed this action. The district court granted defendant's motion to dismiss the complaint based on *Younger* abstention, holding that "the principles of comity and federalism dictate that the federal court abstain so that the State is afforded the opportunity to interpret its rules in the face of a constitutional challenge."[2]

At plaintiffs' request, the district court reopened the case to take evidence that would permit plaintiffs to establish the existence of the degree of bad faith and harassment necessary to bring the case within *Dombrowski v. Pfister*, 380 U.S. 479 (1965), an exception to the general rule of abstention under *Younger*. After plaintiffs conducted extensive discovery, the court held hearings but concluded, after two days, that plain-

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2. The court's language appears to implicate the *Pullman* abstention doctrine, not mentioned in the opinion at all. That doctrine requires abstention by federal courts where there are ambiguous or unsettled questions of state law if construction by the state could avoid the need to reach a federal constitutional question. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). *Pullman* abstention is not appropriate in this case. The disciplinary rules are not susceptible to a construction that would obviate consideration of the constitutional objections to their facial overbreadth. *See* Kennecott Corp. v. Smith, No. 80-2696 (3d Cir. Dec. 17, 1980), slip opinion at 7-9; D'Iorio v. County of Delaware, 592 F.2d 681, 689-91 (3d Cir. 1978). Both the Fourth and the Seventh Circuits have invalidated disciplinary rules similar to those at issue here without discussion of abstention on *Pullman* grounds. *See* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc) (per curiam); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

tiffs had failed to meet their burden of proof to establish that the case fell within the *Dombrowski* exception. The district court stayed the disciplinary proceedings pending this appeal.

III.

The *Younger* doctrine of abstention, developed in the last decade, operates to limit the power of the federal courts to enjoin pending state proceedings when a federal plaintiff's claim of unconstitutionality can be raised and timely decided in the state proceedings. *Younger* abstention is not applicable when, *inter alia*, the state proceedings do not realistically afford plaintiff that opportunity, *Gibson v. Berryhill*, 411 U.S. 564 (1973); when the state proceedings have been brought in bad faith or to harass plaintiff, *Dombrowski v. Pfister*, 380 U.S. 479 (1965); or when the state statute in question is totally infected by blatant unconstitutionality, *Younger v. Harris*, 401 U.S. at 53-54. When the abstention doctrine is inapplicable, the federal courts retain their "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In order to determine whether abstention by the district court was mandated under the *Younger* doctrine, we must examine in some detail New Jersey's scheme for disciplinary proceedings.

The Supreme Court of New Jersey is charged by the state constitution, Article 6, section II, paragraph 3, with responsibility for discipline of members of the state bar and has promulgated Rule 1:20, the court rule governing the investigation, hearing and review of complaints against attorneys. Pursuant to that rule, a complaint

must move through three tiers in the disciplinary process.[3]

1. *District Ethics Committee* (R. 1:20-2).

The District Ethics Committees are authorized to receive information relating to allegedly unethical conduct by a member of the bar. R. 1:20-2(e). The members of the District Ethics Committees, appointed by the Supreme Court, include attorneys and, since 1979, non-attorney members. R. 1:20-2(b). When information is received, the member designated by the Supreme Court as chairman assigns a member who is an attorney to review and inquire into the facts to decide whether a formal complaint should be filed. Based on that member's report, the chairman decides whether to close the inquiry or to proceed to the filing of a complaint. R. 1:20-2(h).

The complaint must contain a statement, signed and sworn to by the complainant, stating the facts constituting the allegedly improper conduct, the disciplinary rules asserted to have been violated, and whether, so far as is known, the same or similar complaints have been considered by any ethics committee. R. 1:20-2(i).

The attorney whose conduct is in question has ten days to answer, and may include in the answer "circumstances of a mitigating nature bearing on the charge." R. 1:20-2(j). Thereafter the chairman, based on a report prepared by the preliminary investigating member of the District Ethics Committee, must decide whether there is

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3. Prior to April 1, 1978 the first level was the County Ethics Committee with direct review by the Supreme Court of New Jersey. Amendments in 1978 reorganized these county committees into district committees, and imposed an intermediate level of review by the Disciplinary Review Board. Since all further proceedings in this case would be governed by Rule 1:20 as amended, see note in R. 1:20-1, we discuss only that version of the rule. The jurisdiction of the new District VIII Ethics Committee is the same as that of the prior Middlesex County Ethics Committee.

a prima facie indication of unethical or unprofessional conduct which will require a hearing. If not, the complaint is formally dismissed. R. 1:20-2(k).

If a hearing is required, it is conducted before a panel of three or more members of the District Ethics Committee, a majority of whom must be attorneys. R. 1:20-2(m). The attorney under investigation is entitled to be present with a legal representative of choice or, if indigent, assigned by a state court for good cause shown. Discovery is allowed, and subpoenas are available by application to the District Ethics Committee. R. 1:20-2(*l*). All witnesses must be sworn and the hearing itself is recorded. R. 1:20-2(*l*), (m). The panel must then prepare a written report containing "its findings of fact and conclusions on each issue presented." Any member not concurring with the report may prepare a separate report. R. 1:20-2(n).[4]

The District Ethics Committee is bound by the conclusions of the hearing panel and must follow its recommendation to dismiss the complaint, prepare a letter of private reprimand, or, if a reprimand is found to be insufficient discipline, prepare a Presentment for consideration by the Disciplinary Review Board. R. 1:20-2(o).

2. *Disciplinary Review Board* (R. 1:20-3).

The Disciplinary Review Board is a statewide body appointed by the Supreme Court with attorneys constituting at least five but no more than six of its nine members.[5] The Board's review is *de novo* on the record,

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4. Rule 1:20-5(d) requires that all proceedings and records made in the disciplinary proceedings be confidential and that no disclosure be made without the respondent attorney's consent. Prior to review in the Supreme Court, disclosure can be made ordinarily only by order of the Supreme Court. The Supreme Court may make whatever disclosure it chooses in connection with its own orders.

5. Five members constitute a quorum and any action other than a recommendation that discipline be imposed can be taken by a majority of the quorum. A recommendation that discipline be im-

which includes the file, transcript and briefs, if any, filed before the District Ethics Committee. R. 1:20-3(d)(3), (e); 1:20-2(o)(3). Where the Board's review is of a determination that there was no unethical or unprofessional conduct, it can affirm or modify the action taken by the District Ethics Committee or remand to the Committee for further proceedings. R. 1:20-3(d)(3). If a letter of private reprimand has been recommended by the Committee, the letter can be sent upon the Board's approval. R. 1:20-2(o)(2). If the Board is reviewing a Presentment, oral argument will be permitted at the request of any party or the Board. The Board is required to "render a formal decision on each matter, which shall include findings of fact and conclusions as to each issue presented, and shall make a specific recommendation as to the appropriate disciplinary action, if any, to be imposed by the Supreme Court." R. 1:20-3(e).

3. *Supreme Court* (R. 1:20-4).

All decisions of the Disciplinary Review Board beyond a private reprimand are reviewed by the Supreme Court of New Jersey. R. 1:20-4(a). The Board's decision is reviewed on the record and briefs before the District Ethics Committee and the Disciplinary Review Board. R. 1:20-4(d). If the Board has recommended disbarment or suspension from the practice of law for a period greater than one year, the Rule provides that the record shall be supplemented by the filing of briefs and by oral argument before the Supreme Court. In all other cases, leave to file briefs or present oral argument must be given by the Supreme Court on motion. R. 1:20-4(a).[6]

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posed or a recommendation for a temporary suspension must have the approval of five members of the Board. Since four members can be non-attorneys, it appears conceivable that a quorum of five could be constituted by four non-attorneys and only one attorney. R. 1:20-3(a), (b).

6. Rule 1:20-4(d) provides that "[a]ll recommendations of the Disciplinary Review Board other than those otherwise referred to in this rule shall be reviewed by the Supreme Court on the full record

IV.

The ability of the federal plaintiff to vindicate the constitutional claim in the pending state proceeding has continually been stressed as a central consideration in determining the applicability of *Younger* abstention. The federal plaintiff is entitled to "a concrete opportunity to vindicate his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). The importance of this factor was the basis for the holding in *Gibson v. Berryhill*, 411 U.S. 564 (1973), that the district court correctly refused to abstain from enjoining a proceeding before the state board of optometry, the body vested by state law with authority to issue, suspend, and revoke licenses for the practice of optometry. The Court there stated that the predicate for a *Younger* dismissal is that the state proceeding provides "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Id.* at 577. Because the state board was incompetent by reason of bias to adjudicate the issues pending before it, abstention was inappropriate. Using a similar analysis, this court held that the district court erred in abstaining when there was no state procedure whereby the federal plaintiffs could raise their claims that the intake procedure used by probation officers employed by the Philadelphia Juvenile Court, to which they had been subjected, was unconstitutional. *Conover v. Montemuro*, 477 F.2d 1072 (3d Cir. 1973) (en banc).

Although the doctrine of *Younger* abstention has been extended since 1973, the relevance of this factor has been repeatedly reiterated. In *Kugler v. Helfant*, 421 U.S. 117, 124 (1975), the Court stated that the policy of equitable restraint expressed in *Younger* "is founded on the premise that ordinarily a pending state prosecution

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NOTE 6 — *(Continued)*
below, supplemented as it may order on its own or a party's motion." Presumably, this encompasses decisions to dismiss charges or send a private reprimand.

provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." In *Juidice v. Vail*, 430 U.S. 327, 337 (1977), the Court reiterated that factor when it stated that plaintiffs "need be accorded only an opportunity to *fairly pursue* their constitutional claims in the ongoing state proceedings. . . ." (emphasis added). The dissent's suggestion that the Supreme Court may have reformulated this factor in *Moore v. Sims*, 442 U.S. 415, 425-26 (1979), is based on a statement in that opinion taken out of context.[7] In fact, in *Moore v. Sims*, the majority on more than one occasion focused on the relevant inquiry in the exact same language which the Court has consistently used: whether plaintiffs " 'had an *opportunity* to present their federal claims in the state proceedings.' *Juidice v. Vail*, *supra*, at 337 (emphasis in original); see *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)." *Id.* at 425.

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7. The dissent relies on the language in Moore v. Sims, 442 U.S. 415, 425-26 (1979), where the Court stated, "abstention is appropriate unless state law *clearly bars* the interposition of the constitutional claims." (emphasis added). In *Moore v. Sims*, there were three state court proceedings pending before the parents' federal suit was filed. The Texas Department of Human Welfare filed a suit for emergency protection of the children under the Texas Family Code, the parents filed a petition for a writ of habeas corpus in state court, and the Texas Department filed a "suit affecting the parent-child relationship" under another provision of state law. In the federal suit, the parents sought to challenge the procedures employed by the state to collect and disseminate child-abuse information. The majority, after examining Texas law with respect to joinder and imposition of claims, found that Texas law was "as accommodating as the federal forum" and did not bar the claim in question. The context of the statement heavily relied on by the dissent here shows clearly it was not directed to whether *any* constitutional claim could be raised in the ongoing state judicial proceeding, which was conceded. Instead the issue was whether this particular constitutional claim could be raised either as a defense or by way of counter claim. That issue is unrelated to the issue here; *i.e.*, whether *any* constitutional claim can be effectively raised before the District Ethics Committee.

We are therefore obliged to focus both on the nature of the claim of unconstitutionality which Hinds asserts in the federal proceeding and whether such a claim could be vindicated in the state proceeding which he seeks to enjoin. Hinds' constitutional attack, in essence, is that (1) application of the disciplinary rules to his statements violates the First Amendment, and (2) insofar as these disciplinary rules proscribe "statements likely to interfere with a fair trial" or "conduct [applied to speech] that is prejudicial to the administration of justice," they are facially vague and overbroad. Language identical to that in DR 7-107 has been declared unconstitutional in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) and *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979). Hinds points out that DR 7-107 was modeled on the Code of Professional Responsibility of the American Bar Association. In 1978, the Association's Standing Committee on Standards for Criminal Justice recommended that the language be substantially modified to assign "greater weight to the attorney's right under the first amendment to make public, extrajudicial statements about criminal investigations or litigation." The revised standard, if adopted, proscribes only statements which "would pose a clear and present danger to the fairness of the trial" and thus incorporates the "serious and imminent threat" standard which the Seventh Circuit held was constitutionally compelled.[8]

In looking to the manner in which Hinds' claim of unconstitutionality could be treated in the proceeding in question, it is immediately apparent that the powers and procedures of the District Ethics Committee stand in sharp contrast to those of the state judicial bodies to

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8. ABA Comm. on Association Standards for Criminal Justice, ABA Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press 1, 2 (2d ed. 1978 Draft).

which the federal courts have abstained. If, following the preliminary inquiry by a member, the chairman decides that a complaint should be filed, and if, following examination of the complaint, answer, and the investigating member's report, the chairman determines there are adequate grounds to proceed, the matter then proceeds to a hearing before a panel of the District Ethics Committee. R. 1:20-2(k). It is evident that this hearing is designed to elicit facts, not legal arguments. It is incongruous for the dissent to suggest that the Ethics Committee can consider constitutional issues. The composition of the hearing panel, which includes non-lawyers, clearly indicates it is not designed or intended to deal with constitutional rulings which often require substantial legal background and the ability to make subtle legal differentiations. The panel's sole power of action is to direct dismissal of the charges. Otherwise it is limited to a recommendation of either a private reprimand or a Presentment, both of which must be considered *de novo* by the Disciplinary Review Board. Action on a Presentment can be taken only by the Supreme Court. There is no provision in any of the rules for a legal or constitutional determination at the Ethics Committee stage. The reason is apparent. No court in this country has heretofore been willing to accept constitutional rulings by non-lawyers. The dissent fails to acknowledge that one of the major changes effected with the revised New Jersey disciplinary structure was inclusion of non-lawyers on both the District Ethics Committee and Disciplinary Review Board. The New Jersey Supreme Court, in discussing the function of the County Ethics Committee *before* the revisions, stressed the special competence of the committees as trained in the law, noting specifically "that *all* committee members, unlike jurors, are members of the bar. . . ." *In re Logan*, 70 N.J. 222, 228, 358 A.2d 787, 791 (1976) (emphasis added).

At argument before this court, counsel for New Jersey suggested that an attorney respondent could raise a claim of unconstitutionality before the Ethics Committee, and if the Committee agreed with the claim, its finding to that effect would be subsumed in a finding that there was insufficient showing to proceed against the attorney charged. This procedure falls short of providing the requisite meaningful opportunity to have the constitutional claims adjudicated. The rules make no provision for the filing of an opinion by the District Ethics Committee. A dismissal at this stage would have no precedential force as to any other District Ethics Committee or the Disciplinary Review Board. The very privacy of the proceeding militates against a meaningful constitutional adjudication, since the determination will not provide any remedy against the chill which the rules and the filing of charges allegedly create in the minds of other members of the New Jersey bar. In fact, New Jersey concedes that the District Ethics Committee is prohibited from issuing advisory opinions, and that its function is limited to consideration of complaints involving the character and professional ability of attorneys. There is another committee and process by which advisory opinions relating to disciplinary rules may be obtained; that committee, the Advisory Committee on Professional Ethics, may not consider an inquiry involving a pending action. R. 1:19.

The state relies on our decision in *Gipson v. New Jersey, Supreme Court*, 558 F.2d 701 (3d Cir. 1977) (per curiam). In *Gipson*, a New Jersey attorney who was being investigated for improper handling of client funds was temporarily suspended by the New Jersey Supreme Court for failure to produce material subpoenaed by the County Ethics Committee. Following his suspension, Gipson commenced a federal court action in which he challenged the constitutionality of the state's rules of attorney discipline. We held that under those circumstances, federal non-interference was appropriate,

stressing that "the question of Mr. Gipson's suspension *is still pending in the state court*." *Id.* at 704 (emphasis added). Gipson's case was already the subject of a state court action at the time the federal proceeding had been initiated. He had already filed a motion to quash the subpoena, which was considered by the New Jersey Supreme Court, and had been afforded oral argument before the Supreme Court on the issue of the propriety of suspension. It is evident that the Supreme Court of New Jersey proceeding afforded Gipson ample opportunity for adjudication of his constitutional claim, and therefore that case does not, as the state claims, control disposition of this appeal.

In most of the cases which have applied *Younger* abstention to suits concerning pending state attorney disciplinary proceedings, the state proceedings had already reached the stage where the state courts were involved in considering the merits or had already been involved in some preliminary stage of the proceedings.[9] For example, in *Erdmann v. Stevens*, 458 F.2d 1205 (2d

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9. *See, e.g.*, Rosenthal v. Carr, 614 F.2d 1219 (9th Cir.), *cert. denied*, 100 S.Ct. 3024 (1980); Gipson v. New Jersey, Supreme Court, 558 F.2d 701 (3d Cir. 1977); Anonymous J. v. Bar Ass'n of Erie Co., 515 F.2d 435 (2d Cir.), *cert. denied*, 423 U.S. 840 (1975); Goodrich v. Supreme Court of South Dakota, 511 F.2d 316, 317 n.2 (8th Cir. 1975); Tedesco v. O'Sullivan, 420 F.Supp. 194 (D. Conn. 1976); Doe v. State Bar of California, 415 F.Supp. 308 (N.D.Cal. 1976), *aff'd* 582 F.2d 25 (9th Cir. 1978), Mildner v. Gulotta, 405 F.Supp. 182 (E.D.N.Y. 1975) (three judge court), *aff'd sub nom.* Levin v. Gulotta, 425 U.S. 901 (1976). *Contra*, ACLU v. Bozardt, 539 F.2d 340 (4th Cir.), *cert. denied*, 429 U.S. 1022 (1976) (board's role advisory; final action must be that of the state court); Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427 (2d Cir.), *cert. denied*, 423 U.S. 863 (1975) (state trial court must make recommendation to discipline in all cases). Many of the courts considering abstention in the context of disciplinary proceedings have not focused on the stage of the proceeding and have not discussed the attorney respondent's opportunity to press the constitutional claims at that stage.

Cir.), *cert. denied*, 409 U.S. 889 (1972), the federal court abstained after the Justices of the Appellate Division of the New York state court system served on Erdmann charges based on his alleged unethical conduct. In New York, unlike New Jersey, the Grievance Committee of the Bar Association refers its recommendation of disciplinary action to the Appellate Division, which then holds a trial *de novo* before any disciplinary action may be taken. *Id.* at 1209. We are aware of no claim there, or in any of the other attorney disciplinary cases, that the attorney respondent would be unable to raise the constitutional claim at the proceeding sought to be enjoined. In fact, in *Erdmann*, the court expressly noted its assumption that the attorney's constitutional rights would be protected in the Appellate Division proceeding. *Id.* at 1211.

Closely intertwined with the inability to raise the constitutional claim in a meaningful manner before the New Jersey District Ethics Committee are two issues relating to *Younger* abstention which have not yet been fully developed in the Supreme Court cases. One is the applicability of *Younger* abstention to administrative proceedings; the other is the stage of the state proceedings at which abstention should be applied. It is of interest that all of the Supreme Court cases which have held that *Younger* abstention was warranted were cases in which the state proceedings sought to be enjoined were judicial proceedings, not administrative proceedings. The distinction was noted by the Court in *Gibson v. Berryhill*, 411 U.S. 564, 574 n. 13, (1973), where it said:

> The doctrine of exhaustion of administrative remedies should, however, be kept distinct from other equitable doctrines such as those exemplified in *Younger v. Harris*, . . . and *Railroad Comm'n v. Pullman Co.* . . . which do require a federal court to defer in appropriate circumstances to state *judicial* proceedings. (emphasis in original).

The Court stated that "administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings", *id.* at 576-77, but did not explicate the "proper circumstances."[10] In other contexts, it has been recognized that we cannot expect administrative proceedings to include a determination of the constitutionality of the laws under which they operate. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749 (1975). We need not attempt to delineate the "proper circumstances" in which deference may be due state administrative proceedings, because such deference would, in any event, only be accorded to administrative adjudicative proceedings. *Younger* abstention has generally been discussed in the context of deference to a state adjudicative proceeding. *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. at 813. The proceedings before the District Ethics Committee cannot be classified as adjudicative because they are limited to fact-finding, they are conducted by committees including members of no special legal competence, and they cannot result in the imposition of any discipline.

In a recent decision, *Supreme Court of Virginia v. Consumers Union*, 446 U.S. (1980), the Court analyzed state bar disciplinary proceedings for the purpose of determining when immunity is appropriate. The Court divided such proceedings, even though carried out entirely under the aegis of the state judiciary, into legislative, adjudicative, and prosecutorial phases. Applying the same analysis here, it is evident that the proceedings before the District Ethics Committee fall with-

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10. In Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977), the district court held *Younger* abstention was applicable only to ongoing state *judicial*, not administrative, proceedings. The Supreme Court declined to decide this issue, holding instead that the state had consented to settle the constitutional issue in federal court. *Id.* at 477-80 & n.10.

in the prosecutorial phase of New Jersey's disciplinary proceedings.

We need not determine, in this case, whether the adjudicative stage begins with the deliberations of the Disciplinary Board, which must take action with respect to the recommendations made by the various District Ethics Committees, as appellants concede, or whether it begins only upon consideration by the Supreme Court of New Jersey, which retains the sole power to take action beyond a private reprimand. The Supreme Court of New Jersey has on several occasions stressed that the county ethics and grievance committees perform the functions of receiving complaints, investigating them, holding hearings on them, and then presenting their findings to the court, but that it is the Supreme Court which makes its findings of fact and conclusions of law. *In re Logan*, 70 N.J. 222, 226-27, 358 A.2d 787 (1976); *In re Loring*, 73 N.J. 282, 289, 374 A.2d 466 (1977); *Toft v. Ketchum*, 18 N.J. 280, 284, 113 A.2d 671, *cert. denied*, 350 U.S. 887 (1955). In rejecting a claim that the Ethics Committee (before the rules were amended) acts as "investigator, prosecutor, judge and jury," that court stated the attorney had the opportunity to submit briefs and orally argue the cause before the Supreme Court, "the only body which has the authority to decide the issues, factual and legal, and fix the disciplinary terms." *In re Logan*, 70 N.J. at 228. It is, therefore, evident that the adjudicative stage had not been reached at the stage of the proceedings before the District Ethics Committee. In the most egregious disciplinary situation, the District Ethics Committee can do no more than recommend a Presentment (the accusatory instrument) which must be considered *de novo* by the Disciplinary Review Board. Although bar disciplinary proceedings are *sui generis*, if we were to analogize these proceedings to state criminal proceedings, the case against Hinds is still at the pre-indictment stage. As in the criminal proceedings, the prosecutor's office is not the appropriate stage at

which the federal plaintiff's constitutional rights can be vindicated. Therefore, this stage of the proceedings, before the issuance of a Presentment, is similar to that of the threatened state court criminal prosecution for which the Supreme Court held abstention inappropriate in *Steffel v. Thompson*, 415 U.S. 452 (1974). The rationale behind *Younger*, to avoid federal intervention which "can be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles," *id.* at 462, was deemed inapplicable when a state court proceeding had not yet begun.

The dissent appears to argue that even if our analogy of the District Ethics Committee proceeding to the prosecutorial stage of a proceeding is apt, *Hicks v. Miranda*, 422 U.S. 332 (1975), commands abstention nonetheless. With all due respect to our dissenting brother, we believe that case offers no support to his position. In *Hicks v. Miranda*, the police seized four copies of a film from the plaintiffs' theatre and filed criminal charges against two of plaintiffs' employees. On the same day the state court ordered plaintiffs to show cause why the film in question should not be declared obscene. The following day, after a hearing, the court declared the film obscene and ordered all copies seized. Plaintiffs chose not to appeal but instead, two days later, filed their federal suit. The complaint in the federal suit was served on January 14, 1974. On January 15, the criminal complaint pending in state court was amended to name the federal plaintiffs as additional parties defendant and to add four conspiracy counts. The Supreme Court held that the three-judge court which issued its judgment on June 4, 1974 declaring the California obscenity statute to be unconstitutional should instead have abstained because no "proceedings of substance on the merits [had] taken place in the federal court" before the appellees themselves were charged in the state criminal proceeding. *Id.* at 349. There is simply nothing in the majority opinion in *Hicks v. Miranda* to suggest that abstention is

proper during the period in which the prosecution is investigating the facts, the analogy to this stage of the disciplinary proceeding since no recommendation for action has yet been made.

As we have noted in previous cases, when the existing Supreme Court precedent does not clearly require the federal courts to abstain, we are reluctant to extend the abstention doctrine to deprive plaintiffs of their option of using the federal forum. *See New Jersey Education Ass'n v. Burke*, 579 F.2d 764, 771 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978); *Johnson v. Kelly*, 583 F.2d 1242, 1249-50 (3d Cir. 1978). If we were to use the balancing of state and federal interests applied in those cases, we must find that the state interest in disciplinary proceedings, although strong, has not reached the crucial stage at which a responsible state body has made a determination that there are sufficient grounds to require Hinds to proceed to adjudicative proceedings with regard to the charge that he has violated his ethical responsibility. On the other hand, the federal interest is strong. As Justice Stewart has stated: "The duty of the federal courts to adjudicate and vindicate federal constitutional rights is, of course, shared with state courts, but there can be no doubt that the federal courts are 'the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.' F. Frankfurter & J. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65 (1927)." *Hicks v. Miranda*, 422 U.S. at 355 (Stewart, J., dissenting). News of the initiation of such proceedings may chill other attorneys from exercising their right to free expression, and Hinds will be subjected to proceedings at which he may never have the opportunity to have his constitutional claims adjudicated.[11]

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11. As noted previously in the text, if the charges are dismissed, Hinds will not be able to have any adjudication on his constitutional claims. If the charges are the subject of Presentment to

The state appears to be arguing that a federal forum should not be available whenever a state forum can be used. We rejected that contention in *New Jersey Education Ass'n v. Burke*, 579 F.2d at 768-69, where we noted the continued viability of the holding in *Monroe v. Pape*, 365 U.S. 167, 183 (1961) that "The federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked." *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. at 813-14. If we were to apply *Younger* abstention in this case, we would extend it far beyond any holding of the Supreme Court. We believe the district court erred in doing so.

Along with the dissent, we recognize that disciplinary proceedings directed against members of the bar are primarily the concern of the state courts. We in no way wish to be understood as repudiating our holding in *Gipson v. New Jersey Supreme Court*, 558 F.2d 701, 704 (3d Cir. 1977), that "in view of the special relationship between state courts and members of their bars, . . . the doctrine of federal non-interference is appropriate in suits concerning pending attorney disciplinary proceedings." We hold only that in the particular circumstances of this case, the predicate for *Younger* abstention — "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) — is lacking. Inasmuch as the state proceedings have not yet reached a stage at which Hinds' constitutional claims may be adjudicated, and because delay may chill the exercise of his first amendment rights, we find that abstention is inappropriate in this case.

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the Supreme Court, the constitutional claims undoubtedly can be pressed at that time. However as the Supreme Court noted, abstention is not "required simply because judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceedings." Gibson v. Berryhill, 411 U.S. at 577.

In light of our holding that abstention was improper, we do not reach the issue of the applicability of the bad faith exception. Nor do we decide whether dismissal on abstention grounds was proper as to the plaintiff organizations who were not parties to the state disciplinary proceedings, an issue they have not raised on appeal. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927-31 (1975); *Conover v. Montemuro*, 477 F.2d at 1078-80; *Lewis v. Kugler*, 446 F.2d 1343, 1349 (3d Cir. 1971).

Accordingly, we will vacate the judgment of the district court and remand this case for further proceedings.

ADAMS, *Circuit Judge*, Concurring

I concur fully in the majority opinion, but write separately to emphasize what is already stated therein: that the disposition of the case at bar does not signal a retreat from our holding in *Gipson v. New Jersey Supreme Court*, 558 F.2d 701 (1977) (per curiam). State courts bear primary responsibility for the discipline of their bar and, in general, the federal judiciary is to exercise no supervisory role in state bar disciplinary proceedings.

Nor does today's decision, in my view, turn on the rather metaphysical question of whether the New Jersey disciplinary structure should be construed to involve three distinct, as opposed to one extended, proceeding. That question, while intriguing, is nonetheless subordinate to the critical inquiry, mandated by *Gibson v. Berryhill*, 411 U.S. 564 (1973), namely, whether the state procedure in question offers "the opportunity to raise and have *timely* decided by a competent state tribunal the federal issues involved." *Id.* at 577 (emphasis added). The crucial facts here are that the New Jersey procedure, as described by the parties, will not provide Mr. Hinds with a timely adjudication of his First Amendment claims, and that, in the meantime, the spectre of

professional discipline may deter him from exercising his constitutional right freely to express his opinions. If the New Jersey procedure were structured so as to provide Mr. Hinds a prompt and meaningful hearing on his constitutional arguments, or if his challenge did not implicate a right that is offended whenever its uninhibited enjoyment is deterred, the result today might well be different.

WEIS, *Circuit Judge*, dissenting.

I begin with the premise the majority concedes, that attorney disbarment proceedings are generally subject to *Younger v. Harris* abstention. We so held in *Gipson v. New Jersey Supreme Court*, 558 F.2d 701 (3d Cir. 1977), and in this position we are in accord with four other circuits.[1]

In *Gipson* we stressed that the traditional power of state courts to discipline attorneys is in a field particularly suited to the principle of federal court noninterference. Because of the special relationship between state courts and the bar, incursions by federal tribunals into pending disciplinary proceedings are antagonistic to notions of comity. As Judge Mansfield wrote in *Erdmann v. Stevens*, 458 F.2d 1205, 1210 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972):

> "It requires little vision to appreciate that if a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court's initiation of a disciplinary proceeding against its own

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1. Rosenthal v. Carr, 614 F.2d 1219 (9th Cir.), *cert. denied*, U.S. , 48 U.S.L.W. 3821 (U.S. June 16, 1980); ACLU v. Bozardt, 539 F.2d 340 (4th Cir.), *cert. denied*, 429 U.S. 1022 (1976); Anonymous J. v. Bar Ass'n of Erie County, 515 F.2d 435 (2d Cir.), *cert. denied*, 423 U.S. 840 (1975); Goodrich v. Supreme Court of S. Dakota, 511 F.2d 316 (8th Cir. 1975).

officer, the state judiciary might suffer an unfair and unnecessary blow to its integrity and effectiveness."

Consonant with these considerations, the district court found that unless an exception to *Younger* was demonstrated, abstention would apply. After an evidentiary hearing failed to substantiate allegations of bad faith and harassment, the court determined that deference to the state proceeding was proper. The majority, however, finds *Younger* inapposite, and reverses on the theory that the District Ethics Committee proceedings do not give appellant the opportunity to adjudicate his constitutional claims. I believe this determination is contrary to *Gipson*, and is born of an erroneous perception of the state's disciplinary procedures.

The Supreme Court of New Jersey appoints the members of the District Ethics Committees, R. 1:20-2(a), that function as

> "arms of the court . . . perform[ing] the very important functions of receiving complaints, investigating them, holding hearings on them, and then presenting their findings to the court.
>
> * * * *
>
> "[T]he filing of a complaint with one of our ethics and grievance committees is in effect a filing with the Supreme Court."

Toft v. Ketchum, 18 N.J. 280, 284, 113 A.2d 671, 674, *cert. denied*, 350 U.S. 887-88 (1955). In a later opinion, *In re Logan*, 70 N.J. 222, 225, 358 A.2d 787, 789 (1976), the court wrote:

> "These committees are agents of the Supreme Court. It is the Supreme Court which in the final analysis makes the factual findings, draws the legal conclusions, and determines the appropriate discipline."

Appendix A

These cases were decided before adoption of the current disciplinary rules in 1978. The major change introduced by the new rules was the interposition of a Disciplinary Review Board between the Supreme Court and the District Ethics Committee. The addition of an intermediate review step in the disciplinary process, however, does not vary the function or status of the District Ethics Committee to any significant degree. The most substantial alteration effected by the new rules has been to delegate part of the Supreme Court's initial review function by assigning its *de novo* consideration to the disciplinary board.

The District Ethics Committee's responsibility to act as the origin for disciplinary matters remains unchanged. The current rules alter the postcommittee procedures. Instead of presenting its findings directly to the Supreme Court, as was the previous practice, the Committee now directs its recommendations to the Disciplinary Review Board. R. 1:20-2(o).

New Jersey's description of its ethics committees as "arms of the court" is not derived from their adjudicative role. Rather, the characterization stems from their preparatory and hearing duties, such as receiving complaints, conducting investigations, presiding over hearings, and recommending findings — functions explicitly entrusted to them by the court. *Toft v. Ketchum, supra.* The Supreme Court retains full control over the proceedings at every level, since it is that body that has the constitutional power to discipline attorneys in New Jersey. N.J. CONST. art. 6, §2. The ethics committees, as well as the disciplinary board, facilitate enforcement of that duty. The responsibilities of the ethics committees in this respect have not varied with the adoption of the current rules and, as before, after the preliminary work is completed, disciplinary matters ultimately are resolved by the Supreme Court.[2]

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2. The only exception is a private reprimand, R. 1:20-4(a).

Appendix A

The New Jersey Court has held that ethics committee proceedings are judicial ones. They are not separate and apart from those of the Supreme Court. At least beginning with the filing of a complaint, the proceedings are deemed to be part of the court's business and under its control. "From the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee." *Toft v. Ketchum, supra* at 284, 113 A.2d at 674. It is a single continuous proceeding, culminating in the Supreme Court.

In *Gipson v. Supreme Court of New Jersey*, 416 F.Supp. 1129 (D.N.J. 1976) (three-judge court), *aff'd*, 558 F.2d 701 (3d Cir. 1977), the court recognized that the ethics committees were agents of the state supreme court and not separate and independent bodies. In *Gipson*, the plaintiff had been suspended from the practice of law pending his compliance with a subpoena from the Ethics Committee. Although the New Jersey Supreme Court had made some interim rulings in the case, including the suspension order, at the time the federal injunction was sought, the matter was pending before the Ethics Committee. Nevertheless, we affirmed the three-judge court's finding that *Younger* required abstention.

Similarly, in *Anonymous v. Association of the Bar of New York*, 515 F.2d 427 (2d Cir.), *cert. denied*, 423 U.S. 863 (1975), *Younger* was invoked when a hearing was in progress before a panel of a bar association grievance committee. Noting that the New York state courts had termed the activities of its ethics committees as "judicial proceedings," the Second Circuit analogized the committee's functions to that of a special master in the federal court. *Id.* at 433. In *Rosenthal v. Carr*, 614 F.2d 1219 (9th Cir.), *cert. denied*, U.S. , 48 U.S.L.W. 3821 (U.S. June 16, 1980), an attorney sought to prevent the commencement of a hearing before a state bar

committee but was rebuffed by the federal courts on *Younger* grounds.

The plaintiff in *ACLU v. Bozardt*, 539 F.2d 340 (4th Cir.), *cert. denied*, 429 U.S. 1022 (1976), attempted to enjoin the processing of a complaint by a state grievance and disciplinary board. The court found that the Board's function was advisory only, with the final determination of any disciplinary action being the province of the state supreme court. Despite this lack of final adjudicatory power, which is the same deficiency alleged here, that case, too, held that *Younger* was applicable.

As these cases demonstrate, disciplinary proceedings, for *Younger* purposes, are not a series of discrete, unrelated segments by independent bodies.[3] Therefore, an assumption that under current rules the Ethics Committee does not have the power to adjudicate a constitutional question misses the mark. Unquestionably, the New Jersey Supreme Court is empowered to adjudicate the plaintiff's constitutional questions, and, from its ruling, an appeal to the United States Supreme Court would be available. *In re Logan, supra*, for example, presented a broad based attack against the disciplinary proceedings on due process grounds that the New Jersey court rejected.

It is also apparent that since *Younger v. Harris* was first announced, the Supreme Court has been firm in requiring that its holding be followed. Indeed, the reach of that decision has been expanded both as to the time it becomes applicable and to the scope of the subject matter included. For example, in *Hicks v. Miranda*, 422

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3. Gibson v. Berryhill, 411 U.S. 564 (1973), provides no support for the plaintiff in avoiding *Younger* because in that case the entity enjoined was an administrative agency, a part of the executive department of the state, not a judicial body, such as that challenged here. *See* Huffman v. Pursue, 420 U.S. 592, 594 (1975); *cf.* Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977).

U.S. 332, 349 (1975), state criminal proceedings had not yet been instituted against the plaintiffs who sought a federal court injunction. The Court nevertheless held that when the state complaint is filed after the action in the district court has begun, but before any federal proceedings of substance have occurred, *Younger* applies in full force.

Here, by contrast, the Ethics Committee had already investigated the matter and served its complaint upon the plaintiff before he turned to the district court. After *Hicks v. Miranda*, plaintiff's contention that the prosecutorial stage of a proceeding does not trigger *Younger* considerations is dubious and of little support as an analogy to the case at hand. Nor can this case be likened to *Steffel v. Thompson*, 415 U.S. 452 (1974), since the filing of the complaint here converts the "threat" of prosecution into a concrete, pending action.

Having concluded that the proceeding before the Ethics Committee is judicial in nature, the remaining question is whether the parties are afforded an opportunity to have their federal claims adjudicated. *Juidice v. Vail*, 430 U.S. 327 (1977). In a recent abstention case, *Moore v. Sims*, 442 U.S. 415 (1979), the Court announced the test for determining if constitutional attacks can be adjudicated in the state court. Rejecting a district court finding that some of the challenged state actions did not involve judicial proceedings, and consequently there was no pending civil litigation, the Supreme Court said, "Certainly, abstention is appropriate unless state law clearly bars the interposition of the constitutional claims." *Id.* at 425-26.

The unquestioned opportunity to present constitutional issues to the New Jersey Supreme Court is in marked contrast to the somewhat ambiguous situation in *Moore v. Sims*. It cannot be said here that New Jersey law and procedure "clearly bar the interposition of the constitutional claims." Thus, even if the majority's approach in fragmenting the disciplinary proceedings is

correct, there has been no showing that the *Moore v. Sims* threshold has been crossed.[4]

Nor am I persuaded that the Ethics Committee may not consider constitutional issues. There is no prohibition in the rules prohibiting assertion of such matters before that Committee. The attorney under investigation may set forth mitigating circumstances in his answer to the complaint, including, I am confident, asserted unconstitutionality of the disciplinary rule alleged to have been violated. Because the New Jersey procedures provide for representation by counsel and the majority of the ethics panel must be lawyers, it is a reasonable assumption that the Committee is to entertain not only factual, but legal issues as well.[5] The fact that the Committee does not issue published opinions is irrelevant, since that same practice is followed in most trial courts. In any event, the powers of the Ethics Committee in this respect under the current rules are the same as those which were in effect under previous practice where we held that *Younger* applied. *Gipson, supra.*

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4. *See* Comment, Defining Younger's Adequate State Forum Requirement, 68 Geo. L. Rev. 989 (1980); 18 Duq. L. Rev. 705 (1980).

5. The fact that the tribunal includes nonlawyers does not preclude recognition as a judicial body. Until adoption of amendments to its constitution in 1968, Pennsylvania permitted lay persons to function as "associate judges" in the Court of Common Pleas in certain counties. The two associate judges who sat with a legally trained judge could overrule him only on questions of fact. Murray's Petition, 262 Pa. 188 (1918). Vermont and other states have had similar lay judges. *See* Note, Do All Judges Have to be Lawyers? Side Judges in Vermont: The Case of State v. Dunkerly, 3 Vt. L. Rev. 147 (1978).

I conclude that the district court properly applied *Younger v. Harris* in dismissing the complaint. I would therefore affirm its judgment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Order, Opinion and Amendment of the United States Court of Appeals for the Third Circuit on Sur Petition for Rehearing

No. 80-1224

GARDEN STATE Bar Association and THE NEW JERSEY ASSOCIATION of Black Women Lawyers, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,

Appellants

v.

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey

(D.C. Civil No. 78-0273)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, HUNTER, WEIS, HIGGINBOTHAM, and SLOVITER, *Circuit Judges**

The petition for rehearing filed by Appellee, Middlesex County Ethics Committee, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

*Judges Gibbons and Garth did not participate in the consideration of this matter.

voted for rehearing by the court in banc, the petition for rehearing is denied.

Chief Judge Seitz and Judges Aldisert, Hunter and Weis would grant rehearing.

BY THE COURT,

DOLORES K. SLOVITER

Circuit Judge

Dated: May 12, 1981

SUR PETITION FOR REHEARING BEFORE PANEL

Present: ADAMS, WEIS, and SLOVITER, *Circuit Judges*

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

Appellee has filed a Petition for Rehearing which appends thereto an affidavit by Stephen W. Townsend, Clerk of the Supreme Court of New Jersey. That affidavit states (1) that the Supreme Court of New Jersey, upon notification that its action would not violate the existing stay in this matter, will bring the constitutional claim of Lennox Hinds directly before it by directing a hearing by the Middlesex District Ethics Committee if further factual findings are necessary to permit the adjudication of the constitutionality of DR 1-102 and DR 7-107(D) or, if no hearing is required, by directing the accelerated filing of briefs and oral argument before the Supreme Court, and (2) that the Supreme Court decided on March 9, 1981 to determine the desirability of formalizing in R.1:20 "the procedures which have heretofore enabled respondents in disciplinary actions to raise constitutional questions."

Appendix B

We assume, without deciding, that we may properly consider that affidavit which contains facts *dehors* the record in ruling on the Petition for Rehearing. *But see In re Sugar Antitrust Litigation*, 579 F.2d 13, 19 (3d Cir. 1978). We decline to grant the petition. In our decision in this case, we held that the dismissal of plaintiffs' federal action was based on the erroneous premise that abstention was required under *Younger v. Harris*, 401 U.S. 37 (1971). We found that abstention was inappropriate because the proceeding before the Ethics Committee, which was the only state proceeding then underway, did not guarantee to Hinds the requisite opportunity to make his federal constitutional arguments. Mr. Townsend's affidavit does not show otherwise.

We will not repeat any of the discussion set forth in our prior opinion but will confine ourselves to the new matters raised in the Petition for Rehearing. We have recently held that in reviewing a district court decision to abstain, the relevant facts are those which existed at the time of the district court's decision. *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 (3d Cir. 1980). Therefore, we must focus on the rules and procedures which were in fact available to Hinds at that time. The Petition for Rehearing does not refer us to any Rule of the Supreme Court of New Jersey which would have insured judicial consideration of Hinds' constitutional claim at the time the complaint was filed in the district court. Instead, it refers us to the decision of the Supreme Court of New Jersey in *In re Logan*, 70 N.J. 222 (1976), where the court referred to motions apparently made before it by the respondent during the course of the disciplinary proceedings. *Id.* at 229. The opinion in that case does not explain the nature of these motions nor the procedure by which they were considered by the court before the conclusion of the preliminary decision by the then County Ethics Committee. It does appear that the preliminary matters raised by motion and considered by the Su-

preme Court were not directed to the merits of the constitutional due process issue which the Supreme Court considered in conjunction with its consideration of the presentments after the conclusion of the proceedings before the County Ethics Committee.

In any event, while the Supreme Court of New Jersey might now interpret its rules to permit it *sua sponte* to certify a disciplinary matter before it, *see* R.2:12-1, such discretionary action by the court is not the equivalent of an established procedure whereby an attorney may obtain a judicial determination of his or her constitutional claim before being required to undergo disciplinary proceedings before two tiers of ethics committees. The absence of an established mechanism is manifested by the Townsend affidavit which states the Supreme Court will now undertake to consider whether such a procedure should be formalized.

Judge Weis, in his dissenting opinion Sur Denial of Rehearing, suggests that this case should be dismissed as moot because the Townsend affidavit "establishes that the state supreme court is now prepared to promptly hear and rule on the Hinds case." We believe this represents a misinterpretation of the doctrine of mootness. That doctrine is derived from the "case or controversy" requirements of Article III of the Constitution which underlies justiciability. In considering whether a controversy has become moot, the courts have focused on the effect of intervening events on the merits of the controversy. The test for mootness requires us to determine if there is no reasonable expectation "that the alleged violation will recur" and that interim events have completely and irrevocably eradicated the effects "of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

In this case the merits of the underlying controversy relate to the two disciplinary rules which have been challenged as unconstitutional both on their face and as applied to Hinds. No action on the merits of this claim

has been taken by the New Jersey court. Thus, the doctrine of mootness is inapplicable.

A recent in banc decision of this court touches upon some of the same considerations raised by the petition for rehearing in this case. In *Finberg v. Sullivan*, No. 79-1129 (3d Cir. 1981), we declined to vacate our opinion holding the Pennsylvania post-judgment garnishment procedures did not comport with due process, although the Pennsylvania Supreme Court revised those procedures to conform to the requirements enunciated in our opinion. In both the *Finberg* case and the present case, the state supreme courts proceeded to act with commendable dispatch following receipt of our respective opinions. Nonetheless, such actions cannot serve as the basis for vacating our judgments and depriving them of their precedential value. Furthermore, in this case, unlike *Finberg*, there has been no action taken by the Supreme Court of New Jersey to rescind the rules which have been challenged as unconstitutional and therefore the issue of mootness, rejected in *Finberg*, is simply inapplicable here.

In our original opinion in this case, we expressly noted that we did not reach the issue of the propriety of dismissal on abstention grounds of the plaintiff organizations who were not parties to the state disciplinary proceedings. *Garden State Bar Association v. Middlesex County Ethics Committee*, No. 80-1224, slip op at 22 (3d Cir. Feb. 24, 1981). Since that time, this court has held that abstention is improper with respect to such parties. *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*, Nos. 80-1253, 80-1254, 80-2703, slip op. at 27 (3d Cir. April 14, 1981). Judge Weis recognizes the precedential effect of that decision but concludes that plaintiff organizations present only a claim derivative of that of Hinds. However, there has been no district court or appellate court consideration of the issue. The allegations in the complaint, fairly read, present an independ-

ent claim by the organizations based on the alleged facial unconstitutionality of the disciplinary rules. The complaint avers that the organizations are not parties to the proceedings before the Ethics Committee. Therefore, under the law in this circuit at the present time, we see no basis for the suggestion made by Judge Weis at page 3 of his dissenting opinion Sur Denial of Rehearing that the district court will be obliged on remand to dismiss the suit. The *New Jersey-Philadelphia Presbytery* decision counsels otherwise.

Although we reaffirm our decision that abstention was unwarranted at the time Hinds brought his federal action, nothing in our opinion was intended to suggest that the New Jersey proceedings should be stayed pending the federal proceedings. The only stay of which we are aware was one issued by the district court pending appeal, a stay which defendant Ethics Committee did not challenge before us. It will apparently expire of its own when the appeal proceedings are concluded, but defendant is free to move for its removal at any time. A preliminary injunction requested by the federal plaintiffs was denied by the district court. We intimate no view of the propriety of any such injunction. In the absence of such an order, suits may proceed concurrently in state and federal forums. *New Jersey Education Ass'n. v. Burke*, 579 F.2d 764, 769 (3d Cir. 1978).

Much of the proposed action by the Supreme Court of New Jersey referred to in the Townsend affidavit, such as the possible formalization of procedures to allow respondents in disciplinary proceedings to raise constitutional issues and the construction of its own disciplinary rules, can proceed independent of the federal action. In a recent case we noted that even when there was a preliminary injunction directed to a New Jersey agency, the New Jersey appellate courts were free to adopt a narrowing construction which would avoid the constitutional issues and might thereby moot the need for federal injunctive relief. *See New Jersey-Philadelphia Presbytery*

of the Bible Presbyterian Church v. New Jersey State Board of Higher Education, supra, slip op at 36.

Accordingly, we deny the petition for rehearing because (1) there is inadequate reason to believe that Hinds could have obtained New Jersey Supreme Court consideration of his constitutional claim when he initiated the federal action and (2) the federal action does not presently bar state court adjudication of Hinds' First Amendment claim, nor could it in any event preclude the New Jersey Supreme Court from narrowing the construction of its own disciplinary rules.

WEIS, *Circuit Judge*, dissenting Sur Denial of Rehearing.

In its original opinion, the majority conceded that *Younger v. Harris*, 401 U.S. 37 (1971), abstention applies to state bar disciplinary proceedings. The panel concluded, however, that Mr. Hinds was unable to bring his constitutional challenges promptly and directly to the New Jersey Supreme Court. Because of that inhibition, the majority believed that *Younger* should not control.

The Townsend affidavit filed in conjunction with the petition for rehearing, however, establishes that the state supreme court is now prepared to promptly hear and rule on the Hinds case. Thus, the sine qua non of the majority's determination — no opportunity for Hinds to promptly present his constitutional claims — no longer exists. Consequently, we must determine whether a justiciable controversy remains, because " 'an actual controversy must exist at [all] stages of appellate . . . review, and not simply at the date the action is intitiated.' " *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646, 649 (5th Cir. 1978), *quoting Roe v. Wade*, 410 U.S. 113, 125 (1973).

Appendix B

In *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), the Court said:

> "[J]urisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, *see* [*United States v. W. T. Grant Co.*, 345 U.S. 629], 633, *see also SEC v. Medical Committee For Human Rights*, 404 U.S. 403 (1972), and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Indiana Employment Security Div. v. Burney*, 409 U.S. 540 (1973).
>
> When both conditions are satisifed it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law."

See also Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972); *Bagby v. Beal*, 606 F.2d 411 (3d Cir. 1979).

Both of these conditions now obtain. The only issue before this court was and is the applicability of *Younger v. Harris, supra*. Having concluded that abstention was proper, the district court did not reach the merits of the underlying controversy, and therefore neither did we.

Even assuming that the majority's original opinion was correct, the issue on appeal as defined by the majority has become moot. *Hall v. Beals*, 396 U.S. 45, 48 (1969); *see New Left Education Project v. Board of Regents of the University of Texas System*, 472 F.2d 218 (5th Cir.), *vacated and remanded as moot*, 414 U.S. 807 (1973). The other appellants pursued their appeal on purely derivative grounds, and consequently, their claims also are moot. *ACLU v. Bozardt*, 539 F.2d 340 (4th Cir.), *cert. denied*, 429 U.S. 1022 (1976); *cf. New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Board of Higher Education*,

Appendix B

F.2d , Nos. 80-1253, 80-1254, 80-2703 (3d Cir. Apr. 14, 1981).

Other effects of the changed circumstances also counsel for dismissal. The majority's premise in its original opinion apparently was that the proceeding before the Ethics Committee did not constitute a judicial proceeding. That proposition, however, is not relevant given the current status of the disciplinary action. Even if the Hinds disciplinary action was not judicial in nature when the appeal was filed, it unquestionably became so when the New Jersey Supreme Court issued its current directive. As matters now stand, therefore, *Younger* has been given renewed vitality. Since the majority disavows any intention of undermining the precedential effect of *Gipson v. New Jersey Supreme Court*, 558 F.2d 701 (3d Cir. 1977), on remand, the district court must once more address the question of abstention.

Although the federal suit was filed before the state supreme court acted directly, that chronology does not per se resolve the issue. *In Hicks v. Miranda*, 422 U.S. 332, 349 (1975), the Court held that the principles of *Younger* apply in "full force" when state proceedings are begun "after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court."

The activity in the district court to this point has been devoted to determining whether *Younger* applies, rather than focusing on the merits of the constitutional arguments advanced by Mr. Hinds and the other plaintiffs. Therefore, on remand the district court will no doubt conclude it had not entertained any proceedings of substance on the merits, and consequently feel obliged once more to honor *Younger* and dismiss the suit.

Although the normal procedure would be to remand to the lower court for reconsideration of the *Younger* issue as it now stands, since correct resolution of the issue is clear, judicial economy is better served by dismissal

now. *In re Hronek*, 563 F.2d 296, 298 (6th Cir. 1977). If not, the proceedings here will have much in common with "The Grand Old Duke of York" of nursery rhyme fame,

> "He had 10,000 men, he marched them up a very high hill and he marched them down again. And when he was up he was up and when he was down he was down and when he was only half way up he was neither up nor down."

The issue on which the majority decided this case has simply vanished. The action of the New Jersey Supreme Court has effectively removed the matter in controversy before us. Therefore, unless the majority finds merit to the "bad faith" exception to *Younger*, which the district court rejected, the effective legal relief that the panel could have granted, based on the premise it applied here, no longer obtains. The matter is no longer justiciable. *See In re Gerard J. Cantwell*, ___ F.2d ___, No. 80-1711, slip op. at 8-9 (3d Cir. filed Feb. 4, 1981). Since final judgment has not yet been entered, this court should remand to the district court for dismissal on the ground of mootness.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1224

GARDEN STATE BAR ASSOCIATION and
THE NEW JERSEY ASSOCIATION OF
BLACK WOMEN LAWYERS, etc., et al.,
Appellants

v.

MIDDLESEX COUNTY ETHICS COMMITTEE,
an agency established by the
Supreme Court of New Jersey

(D.C. Civil No. 78-0273)

Present: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, HUNTER, WEIS, HIGGINBOTHAM,
and SLOVITER, *Circuit Judges.**

ORDER AMENDING OPINION

The court having discovered that the slip opinion prepared by the printer is not in conformity with the original opinion filed on May 12, 1981, it is

ORDERED that the nursery rhyme on page 10 of the dissent be printed in stanza form, as follows:

"He had 10,000 men,
he marched them up a very high hill
and he marched them down again.

---

*Judges Gibbons and Garth did not participate in the consideration of this matter.

Appendix B

And when he was up he was up
and when he was down he was down
and when he was only half way up
he was neither up nor down."

BY THE COURT.

JOSEPH F. WEIS, JR.
Circuit Judge

DATED: May 19, 1981

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-1224

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,

Appellants,

vs.

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,

(D. C. Civil No. 78-0273)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix C

Present:

ADAMS, WEIS and SLOVITER, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 16, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 14, 1980, be, and the same is hereby vacated and the cause remanded for further proceedings in accordance with the opinion of this Court.

ATTEST:

SALLY MRVOS
Clerk

February 24, 1981

Certified as a true copy and issued in lieu of a formal mandate on May 20, 1981.

Test: SALLY MRVOS
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX D

Memorandum Opinion of the United States District Court for the District of New Jersey

(Filed—June 6, 1978)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL No. 78-273

GARDEN STATE BAR ASSOCIATION, etc., *et al.*,

Plaintiffs,

vs.

MIDDLESEX COUNTY ETHICS COMMITTEE, etc.,

Defendant.

FISHER, District Judge

Plaintiffs have moved for a preliminary injunction to restrain defendant Middlesex County Ethics Committee from continuing the attorney disciplinary proceedings pending against plaintiff Lennox Hinds. The defendant contends that the motion should be denied and the complaint dismissed pursuant to the abstention doctrine contained in *Younger* v. *Harris,* 401 U.S. 37 (1971).

The Ethics Committee charges that statements made by Hinds violate attorney disciplinary rules promulgated by

the New Jersey Supreme Court. These statements, made at a press conference held during the trial of Joanne Chesimard (Assata Shakur), questioned the ability of the trial judge to conduct the trial in a racially neutral manner.

The plaintiffs contend that the disciplinary rules in question unconstitutionally abridge First Amendment rights. The rules provide, in pertinent part:

> DR1-102 *Misconduct*
>
> (A) A lawyer shall not:
>
> * * *
>
> (5) Engage in conduct that is prejudicial to the adminstration of justice.
>
> DR7-107
>
> * * *
>
> (D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that he expects to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial. . . .

Younger abstention requires that a federal court refrain from interfering in certain on-going state proceedings, unless extraordinary circumstances dictate otherwise. This principle applies to attorney disciplinary proceedings. *Erdmann* v. *Stevens,* 458 F.2d 1205 (2d Cir. 1972); *Gipson* v.

New Jersey Supreme Court, 558 F.2d 701 (3d Cir. 1977). The issue of abstention is not reached, however, where a biased state tribunal would deprive the litigant of the fair and impartial trial required by due process. *Younger* abstention presupposes an opportunity for the plaintiff to "raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson* v. *Berryhill,* 411 U.S. 565, 577 (1972). Impermissible bias allegedly exists in the disciplinary proceedings because the Ethics Committee, as an agency of the New Jersey Supreme Court, cannot reasonably be expected to fairly pass upon the constitutionality of rules promulgated by that body. Plaintiffs further contend that review of the Ethics Committee's decision would not alleviate bias and unfairness, since the New Jersey Supreme Court cannot be expected to invalidate its own rules.

A state tribunal was found to be biased and precluded *Younger* abstention where its members had a significant pecuniary interest adverse to the litigants. *Gibson* v. *Berryhill,* 411 U.S. at 579. Other instances of biased tribunals include where the adjudicating members were subjected to personal or critical abuse by the litigants prior to trial and where a tribunal member was previously associated with a litigant appearing before the tribunal. *See Withrow* v. *Larkin,* 421 U.S. 35, 47, 50-51, n.16 (1975).

However, the honesty and integrity of adjudicators are presumed, and absent a showing to the contrary, "'state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Withrow* v. *Larkin,* 421 U.S. at 55, *quoting United States* v. *Morgan,* 313 U.S. 409, 421 (1941).

Appendix D

Impermissible bias was not shown where the Federal Trade Commission evaluated the legality of certain conduct, even though some Commission members had previously announced that they felt such conduct was illegal. *FTC* v. *Cement Institute,* 333 U.S. 683 (1948). The Court noted that the litigants had the opportunity to convince the Commission members of the legality of their conduct through the presentation, evidence and legal argument. *Cement Industry, supra* at 701.

In *Withrow* v. *Larkin, supra,* the Supreme Court found that a state medical board of examiners could, without violating due process, investigate charges alleging unprofessional conduct by a doctor, and then determine the validity of the charges. The Court found it very typical for members of administrative agencies to receive results of investigations, approve the filing of charges, institute enforcement proceedings and then participate in the ensuing hearings. 421 U.S. at 56. The Court held that this procedure did not violate due process, at least where no specific foundation had been presented for suspecting that the board had been prejudiced by the investigation or that it would be disabled from fairly deciding the matter on the basis of contested evidence. 421 U.S. at 57-58.

In the instant matter, the plaintiffs have not alleged that the Committee members have a pecuniary interest in the outcome, or that they were subject to personal or critical abuse by plaintiff Hinds. Instead, the plaintiffs contend that due process is violated where the decision-makers are asked to pass on the validity of their own rules. However, other than this bare allegation of bias, the plaintiffs have presented no facts tending to show that prejudice, bias or the inability to render a fair decision on the part of the members of the Ethics Committee or the New Jersey Supreme Court exists.

Furthermore, the procedure employed in the disciplinary process represents an attempt to "minimize the risks of bias." *Withrow,* 421 U.S. at 54, n. 20. A district ethics committee investigates charges, conducts a prompt formal hearing, and files a presentment to the Disciplinary Review Board if unethical practices are found. The Disciplinary Review Board, consisting of attorneys and laymen, makes a *de novo* determination on all presentments and submits a recommendation for sanctions to the New Jersey Supreme Court, which reviews all recommendations.

The Court holds, in light of the absence of facts showing actual bias, the safeguards present in the disciplinary procedure, and the important interest of the state in regulating the conduct of its attorneys, that the presumption of honesty and integrity in decision-makers has not been overcome and that the due process rights of plaintiff Hinds have not been violated. *See Hortonville Dist.* v. *Hortonville Ed. Assn.,* 426 U.S. 482, 497 (1976).

Having determined that the predicate for *Younger* abstention exists, it must be decided whether abstention is proper in this instance. Principles of equity, comity and federalism preclude federal intervention in on-going state affairs, unless extraordinary circumstances are present. *Younger,* 401 U.S. at 54.

The fundamental policy against federal interference with state proceedings will not, however, prevent federal intervention where the plaintiff is able to demonstrate great and immediate irreparable injury. *Younger, supra* at 46. The inconvenience, cost and anxiety of defending against a single law suit does not constitute great and immediate irreparable injury. *Id.* "Instead, the threat to

the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against . . ." a single suit. *Id.* Great and immediate irreparable harm was shown in *Dombrowski* v. *Pfister,* 380 U.S. 479, 482 (1965), where state officials employed arrests, seizures and threats of prosecution to discourage the federal plaintiffs from attempting to vindicate their constitutional rights. *Younger, supra* at 48.

The rationale for requiring great and immediate irreparable harm is derived from the principles of comity and federalism. The Supreme Court has recognized that deference to the ability of state courts to safeguard federal constitutional rights plays a major role in *Younger* abstention. *Juidice* v. *Vail,* 430 U.S. 327, 336-37 (1977); *Trainor* v. *Hernandez,* 431 U.S. 434, 446 (1977); *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471, 477 (1977).

The plaintiffs have not alleged that Hinds will not be afforded an opportunity to present his constitutional claims in the disciplinary proceedings. Generally, disciplinary proceedings fall far short of the *Dombrowksi* situation, where assertion of constitutional claims in the state proceedings could not prevent the pattern of threats and harassment engaged in by the state officials. *Erdmann* v. *Stevens,* 458 F.2d 1205, 1210 (2d Cir. 1972). Having no reason to assume that the plaintiff's constitutional rights will not be protected in the state disciplinary proceedings, the Court finds that the great and immediate irreparable harm required for federal intervention does not exist here. Implicit in this finding is the recognition of the state's interest in both considering constitutional challenges to its rules and regulating the conduct of its attorneys. *Trainor* v. *Hernandez,* 431 U.S. at 445; *Erdmann* v. *Stevens,* 458 F.2d at 1211.

Appendix D

State proceedings instituted in bad faith or for harassment are also an example of the extraordinary circumstances permitting federal intervention. *Younger, supra* at 53-54. Bad faith is defined as the bringing of a prosecution without a reasonable expectation of obtaining a conviction. *Kugler* v. *Helfant,* 421 U.S. 117, 126, n.6 (1973). The plaintiffs contend that the disciplinary proceedings are brought in bad faith because Hinds could not have possibly violated DR7-107, which prohibits lawyers associated with the prosecution or defense of a criminal trial from making certain statements. Hinds was not the defense attorney of record for Chesimard and claims to have made the statements in his capacity of Director for the National Conference of Black Lawyers.

This argument does not persuade the Court that bad faith exists on the part of the Ethics Committee. Assuming there is no reasonable possibility that Hinds violated DR7-107, it could still be found that Hinds violated DR1-102, which proscribes conduct prejudicial to the administration of justice.

Also, as noted previously, the institution of disciplinary proceedings generally fall far short of the conduct found to demonstrate bad faith and harassment in *Dombrowski, supra.* There, state officials employed threats of prosecution and repeated arrests without hope of obtaining convictions to curtail assertion of constitutional rights. There have been no allegations that the Ethics Committee possessed such malicious intent in instituting this proceeding.

The Court also believes that Hinds could be found to have violated DR7-107. It would not be unreasonable for the Ethics Committee or the New Jersey Supreme Court

to interpret "associated with the prosecution or defense" to include lawyers other than those actually engaged in the trial. Hinds represented Chesimard in other cases and admittedly was concerned about the outcome of this trial. In light of the unique relationship between the state and its attorneys, the disciplinary proceedings would seem to be the proper forum for interpretation of this rule.

Another extraordinary circumstance in which a federal court may enjoin a state proceeding exists where the statute or rule involved is "flagrantly and patently" unconstitutional. *Younger, supra* at 53. The plaintiffs contend that the rules involved here satisfy this standard. DR1-102 is allegedly void for vagueness, while DR7-107 allegedly violates the First Amendment rights of free speech and freedom of expression.

Federal intervention is not proper solely on the basis that the statute abridges First Amendment rights "on its face." The statute or rule must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger,* 401 U.S. at 37-38 (citation omitted).

The Seventh Circuit has found that DR7-107 unconstitutionally impinges upon lawyer's First Amendment rights. *Chicago Counsel of Lawyers* v. *Bauer,* 522 F.2d 242 (7th Cir. 1975). However, the *Bauer* decision does not convince this Court that DR7-107 "flagrantly and patently" violates express constitutional prohibitions so as to justify federal intervention. Rather than invalidating the entire rule, the *Bauer* court merely indicated the necessity for more restrictive language in a portion of the

rule to avoid unconstitutionality for being overbroad. 522 F.2d at 249. Furthermore, the question of abstention was not present in *Bauer,* since challenge to the rule arose through a declaratory judgment action with no state proceeding pending.

While finding it unconstitutional in some respects, the court in *Bauer* recognized that DR 7-107 performed the vital function of protecting the Sixth Amendment right to a fair trial. *Id.* at 249. A recent district court decision reflected this concern in holding that DR7-107 did not violate First Amendment rights. *Hirschkop* v. *Virginia State Bar,* 421 F.Supp. 1137 (E.D.Va. 1976). The court in *Hirschkop, supra,* while aware of the *Bauer* decision, felt that DR7-107 struck a fair balance between the right to a fair trial and the right to free speech. *Hirschkop,* 421 F.Supp. at 1157. The court noted that the rule was "far from perfect, but the Constitution does not require perfection." *Id.*

In light of these decisions, and after examining both DR1-102 and DR7-107, it cannot be said that the rules are so blatantly unconstitutional so as to render abstention inapplicable.[1] The principles of comity and federalism

---

[1] To support the contention that DR 7-107 unconstitutionally abridges First Amendment rights, plaintiffs brought to the Court's attention the report of the Fair Trial/Free Press Committee of the American Bar Association. The Committee recommends that the language presently contained in DR 7-107, "reasonably likely to interefere with a fair trial", be changed to "pose a clear and present danger to the fairness of the trial." (See text of DR7-107 *supra.*)

(Footnote continued on following page)

dictate that the federal court abstain so that the state is afforded the opportunity to interpret its rules in the face of a constitutional challenge. *Cf. Trainor* v. *Hernandez,* 431 U.S. at 445.

Having determined that abstention is proper, the Court must dismiss the complaint. Declaratory relief cannot be granted when an injunction would be improper under *Younger* abstention. *Samuels* v. *Mackell,* 401 U.S. 66, 72 (1970). Although the organizational plaintiffs appear to have standing, declaratory or injunctive relief cannot issue at the request of a party allegedly inhibited from expressing his views by a pending state proceeding, where that party is not actually subject to the state proceedings. *Younger,* 401 U.S. at 42.

The defendant shall submit an order denying the plaintiffs' motion for a preliminary injunction and dismissing the complaint within ten days.

Dated: June 5, 1978

(Footnote continued from preceding page)

Despite the Committee's proposal, which assigns greater weight to the attorneys' right under the First Amendment to make public, extrajudicial statements about criminal litigation, the Court is not convinced that DR7-107, in its present form, satisfies the *Younger* standard for federal intervention in state proceedings. Under *Younger*, the district court is not empowered "to survey statute books and pass judgment on laws before the courts are called upon to enforce them." 401 US. at 52. Instead, federal courts can only enjoin state enforcement of rules and statutes which are "flagrantly and patently" unconstitutional.

Although DR 7-107 may ultimately be modified to reflect the Committee's concern for greater protection of First Amendment rights, this Court cannot, under *Younger,* prevent the state from passing upon the validity of its rules where disciplinary proceedings are currently pending.

APPENDIX E

Letter Opinion of the United States District Court for the District of New Jersey, December 13, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Newark, N. J. 07101

Chambers of
CLARKSON S. FISHER
Chief Judge

December 13, 1979

Stacy L. Moore, Jr.
Deputy Attorney General
State House Annex
Trenton, New Jersey 08625

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126 West 119th Street
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744 Broad Street
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Bernard K. Freamon, Esq.
c/o Seton Hall University
School of Law
1095 Raymond Boulevard
Newark, New Jersey 07102

Appendix E

Alfred A. Slocum, Esq.
15 Washington Street
Newark, New Jersey 07102

Re: Garden State Bar Association, et al.
v. Middlesex County Ethics Committee
Civil Action No. 78-273

Sirs:

On June 6, 1978 this court filed its memorandum opinion denying injunctive relief to plaintiffs and dismissing the complaint pursuant to the abstention doctrine in *Younger* v. *Harris*, 401 U.S. 37 (1971). Thereafter, I reopened the case for the limited purpose of permitting plaintiffs, through evidentiary hearing, to demonstrate, if possible, the degree of bad faith and harassment found in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), which would operate as an exception to *Younger*.

Considerable discovery was conducted and two hearings were held before me. The record reveals that on or about January 20, 1977, Lennox S. Hinds, a black member of the New Jersey Bar and then National Director of the National Conference of Black Lawyers, called a press conference in New Brunswick, New Jersey, at which time he criticized the conduct and abilities of the Honorable Theodore Appleby, who was presiding at the trial in that city of an indictment against Joanne Chesimard (Assata Shakur). That case and Hinds' remarks were given broad media coverage and public attention.

Thereafter, the Middlesex County Ethics Committee investigated the incident and in reliance upon press reports linking Mr. Hinds with the Chesimard defense team, formulated a report charging Hinds with violation of the following disciplinary rules:

Appendix E

DR1-102 *Misconduct*

(A) A lawyer shall not:

• • •

(5) Engage in conduct that is prejudicial to the administration of justice.

DR7-107

• • •

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that he expects to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial . . .

Plaintiffs were given an opportunity of a full hearing after which I find that plaintiffs have failed to meet their burden of proof and that the Middlesex County Ethics Committee did not act in bad faith or in any way harass Hinds, but sought only to fulfill its function as agent of the New Jersey Supreme Court and guardian against infractions of the disciplinary rules.

Although I make no finding as to Hinds actual role vis-a-vis the trial proceedings, I note that Judge Appleby in deposition testimony minimizes any adverse effect of Hinds' comments upon the judicial system, and I am satisfied that Hinds will have a full and fair opportunity to address all charges that may be brought against him through the state process.

Appendix E

There has been no evidence deduced to justify an exception to the *Younger* abstention doctrine. Accordingly, my opinion of June 6, 1979 stands unchanged.

Defendants shall submit an order within ten days.

Very truly yours,

CLARKSON S. FISHER
Chief Judge

CSF:ngm

APPENDIX F

Affidavit of Stephen W. Townsend

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Civil Action No. 80-1224

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,

Appellants,

v.

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,

Appellee.

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } SS.:

I, STEPHEN W. TOWNSEND, being duly sworn according to law, upon my oath hereby depose and say:

Appendix F

1. I am the Clerk of the Supreme Court of New Jersey and have served in this capacity since October 1977.

2. As part of my official responsibilities, I attend conferences of the Supreme Court and cause official actions taken by that body to be recorded.

3. At a conference of the Supreme Court held on Monday, March 9, 1981, the decision of the United States Court of Appeals for the Third Circuit, filed February 24, 1981 in the present matter, was reviewed. Upon consideration, the Supreme Court decided to bring the constitutional claim of Lennox Hinds, Esquire, directly before it. The Supreme Court will, upon notification that its action would not violate the existing stay in the within matter, proceed in the following manner:

A. Enter an Order certifying the entire record in this matter now pending before the Middlesex District Ethics Committee, including the questions of constitutional dimension raised by Lennox Hinds, Esquire, and directing the parties to submit briefs on an accelerated basis to determine whether further factual findings are necessary to permit the adjudication of the constitutionality of DR1-102 and DR7-107(D), both on its face and as applied to Mr. Hinds;

B. If a hearing is found to be necessary, Court will remand the matter to the Middlesex District Ethics Committee to develop an appropriate record;

C. If no hearing is required or, if one is held, the Supreme Court will direct the accelerated filing of further briefs on the merits. Oral argument will follow.

Appendix F.

4. The Supreme Court also decided on March 9, 1981 to determine the desirability of formalizing in R. 1:20 the procedures which have heretofore enabled respondents in disciplinary actions to raise constitutional questions.

STEPHEN W. TOWNSEND

Subscribed and sworn to
before me this 9th day
of March, 1981.

DAVID A. LAMPEN
An Attorney at Law
of New Jersey

APPENDIX G

Order on Certification of the Supreme Court of New Jersey

(Filed—June 8, 1981)

SUPREME COURT OF NEW JERSEY

D-61 September Term 1980

In the Matter of

LENNOX S. HINDS

An Attorney at Law.

This matter having been duly considered by the Court, it is ORDERED that, pursuant to Rule 2:12-1, the complaint now pending against Lennox S. Hinds before the District VIII Ethics Committee be certified to this Court directly to the end that the entire record including, but not limited to, the constitutional challenges to DR1-102 and DR7-107 (D) raised by respondent, be considered by this Court; and it is further

ORDERED that counsel for respondent Hinds serve and file nine copies of a brief addressing the question of whether further factual findings are necessary to adjudicate the constitutionality of DR1-102 and DR7-107(D), both on its face and as applied to respondent, said brief to be submitted within 10 days of the filing date of this Order; and it is further

Appendix G

ORDERED that counsel for complainant Committee serve and file its brief in response within 10 days thereafter.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 3rd day of June, 1981.

STEPHEN W. TOWNSEND
Clerk

Joint Appendix

NO. 81-460

Office - Supreme Court, U.S.
FILED
DEC 21 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,

Petitioner,

vs.

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1981

CERTIORARI GRANTED NOVEMBER 2, 1981

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B. Letter Opinion of the United States District Court for the District of New Jersey (See App. E to Pet. for Cert., 55a-58a).

III. Opinions, Orders and Judgment in Question 12a

A. Opinion of the United States Court of Appeals for the Third Circuit (See App. A to Pet. for Cert., 1a-30a).

B. Order, Opinion and Amendment of the United States Court of Appeals for the Third Circuit sur Petition for Rehearing (See App. B to Pet. for Cert., 31a-42a).

C. Judgment of the United States Court of Appeals for the Third Circuit (See App. C to Pet. for Cert., 43a-44a).

IV. Relevant Regulatory Provisions 13a

Disciplinary Rules adopted by the Supreme Court of New Jersey, DR1-102(A)(5) and DR7-107(D) (See Pet. for Cert., 3).

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JOINT APPENDIX

I. Relevant Docket Entries

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

[Caption omitted in printing]

1978

Feb. 14—Complaint filed 2-10-78; Summons issued.

Mar. 1—Order to Show Cause Re: preliminary injunction returnable 3-20-78 filed (Fisher) (Notice Mailed).

Mar. 21—At call for hearing on Order to Show Cause Re: preliminary injunction. Court reported motion withdrawn (Fisher) (3-20-78).

Mar. 23—Answer filed.

Apr. 20—Notice of Motion of plaintiff for preliminary injuction returnable 5-15-78 with Proof of Mailing annexed filed (Brief submitted).

Apr. 20—Affidavit of Dr. George Jackson filed.

Apr. 20—Affidavit of Craig Polite filed.

May 5—Defendant's Notice of Cross-Motion to Dismiss Complaint or for Summary Judgment and for Stay of Discovery returnable 5-15-78 filed.

May 11—Deposition of D. M. Foley taken on 5-8-78 filed 5-10-78.

May 16—Hearing on plaintiff's motion for preliminary injunction. DECISION RESERVED. (Fisher) 5-15-78.

Hearing on defendant's Motion to Dismiss or for summary judgment. DECISION RESERVED. (Fisher) 5-15-78.

Relevant Docket Entries

1978

June 6—Memorandum filed (Fisher) (Denying preliminary injunction and dismissing complaint).

June 20—Order denying plaintiffs' motion for preliminary injunction and granting dismissal with costs in favor of defendant, Middlesex County Ethics Committee and against the plaintiffs, Garden State Bar Association and the New Jersey Association of Black Women Lawyers, National Conference of Black Lawyers and Lennox Hinds filed. (Fisher) (Notice mailed).

June 29—Plaintiffs' Motion to alter or amend judgment with affidavit in support and proof of mailing annexed filed 6-28-78.

Oct. 16—Ordered hearing on plaintiffs' Motion to alter or amend judgment adjourned to 11-8-78 (Fisher).

Nov. 28—Deposition of Edward J. Barone, taken on October 30, 1978, filed 11-22-78.

Dec. 1—Deposition of David Foley, Esq. and Hon. Theodore Appleby taken on October 30, 1978, filed 11-30-78.

Dec. 1—Deposition of Michael Oropollo, Esq. taken on November 8, 1978, filed 11-30-78.

Dec. 1—Deposition (continued) of Henry Ruschmann taken on November 8, 1978, filed 11-30-78.

Dec. 4—Affidavit of Bernard K. Freamon filed 12-1-78.

Dec. 4—Order to show cause why witness, Edward J. Barone, Esq. should not be compelled to provide discovery and pay reasonable expenses returnable 12-8-78. (Fisher) (Notice mailed).

Relevant Docket Entries

1978

Dec. 7—Depositions of Michael A. Cohan, Esq. and William C. Moran, Jr., Esq., taken on 11-16-78 filed.

Dec. 11—Hearing on plaintiffs' motion to alter or amend judgment. Hearing on order to show cause why witness, Edward J. Barone, Esq. should not be compelled to provide discovery and pay reasonable expenses. DECISION RESERVED.

Ordered hearing continued on 1-12-79. (Fisher) (12-8-78).

1979

Feb. 21—Notice to take depositions of certain persons on 3-13-79 filed.

Feb. 21—Plaintiffs' letter re: withdrawing order to show cause filed.

Feb. 26—Amended Notice to take depositions of certain persons on 3-13-79 with proof of mailing annexed filed.

Mar. 8—Notice of motion of defendant to vacate amended notice of deposition and to quash certain subpoena returnable 4-2-79 filed (Brief submitted).

Apr. 2—Hearing on defendant's motion to vacate amended notice to take deposition and to quash certain subpoena.

Oral opinion read into record.

Ordered motion granted, in part; denied, in part.

Ordered all discovery to be completed within 45 days.

Order to be submitted (Fisher).

Relevant Docket Entries

1979

Apr. 9—Order vacating Notice to take depositions of Richard S. Rebeck, and Ralph C. Petrone; denying same as to C. Judson Hamlin and Edward Barrone; etc. and directing discovery be completed in 45 days filed (Fisher) (Notice mailed).

Apr. 16—Notice to take deposition of Hon. C. Judson Hamlin and Edward Barrone, Esq. to be taken on 5-8-79, filed.

June 28—Depositions of C. Judson Hamlin and Edward J. Barrone taken on 5-8-79 filed 6-27-79.

Oct. 2—Continued hearing on plaintiffs' motion to alter or amend judgment.

Ordered proposed findings of fact and conclusions of law be submitted within 10 days of receipt of transcripts of hearings. DECISION RESERVED. (Fisher).

Oct. 23—Transcript of hearing on 12-8-78 filed.

Oct. 23—Transcript of hearing on 10-2-79 filed.

Dec. 17—LETTER OPINION filed 12-13-79. (motion to alter or amend judgment denied).

1980

Jan. 15—Order denying plaintiffs' motion for preliminary injunction and granting defendant's motion for dismissal without costs, filed 1-14-80 (Fisher) (Notice Mailed).

Jan. 25—Notice of Appeal of plaintiffs received and filed on 1-24-80 at 8:30 am (Notice mailed to Clerk, USCA and to Attorney General of NJ).

Relevant Docket Entries

1980

Feb. 11—Record on Appeal forwarded to Clerk, USCA (copies to counsel).

Feb. 21—Notice of Motion of Plaintiffs for stay of proceedings before Middlesex County Ethics Committee, returnable 3-10-80 and proof of service filed 2-19-80 (Brief submitted).

Mar. 25—Hearing on plaintiffs' motion for stay of proceedings before Middlesex County Ethics Committee. Ordered motion granted. Order to be submitted (Fisher) (3-24-80).

Apr. 16—Order granting stay pending appeal filed 4-14-80.

Apr. 16—First Supplemental Record on Appeal forwarded to Clerk, USCA (Notice to counsel).

1981

Mar. 3—Opinion of U.S.C.A. filed 3-2-81 (Action remanded for further proceedings) filed.

May 19—Opinion of U.S.C.A. filed.

May 21—Order amending opinion of U.S.C.A. filed.

May 21—Certified copy of U.S.C.A. judgment vacating District Court judgment of 1-14-80 and remanding for further proceedings in accordance with opinion of USCA filed.

May 21—Record returned by USCA.

May 28—Order re-allocating action to Newark, New Jersey and directing action to remain assigned to Judge Fisher, filed 5-26-81. (Fisher) (Notice Mailed).

Relevant Docket Entries

1981

June 23—Order on mandate vacating order of U.S.D.C. dated 1-14-80 and directing case to proceed in accordance with mandate of U.S.C.A. filed 6-22-81. (Fisher) (Notice Mailed).

Relevant Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

1980

Feb. 15—Certified copy of Notice of Appeal received 1-28-80 filed.

Record received 2-13-80 filed.

Exhibits received 2-13-80 filed.

Apr. 17—First Supplemental Record (Nos. 40 & 41) filed.

May 1—Brief for appellants received 4-11-80 filed (25cc). Service of brief and appendix by mail on 4-9-80 attached.

May 1—Appendix received 4-11-80 filed (4cc).

May 27—Brief for appellee received 6-2-80 filed (25cc).

July 2—Motion by appellant for an order permitting the following relief: (a) leave to file reply brief one-day out of time, (b) leave to file the reply brief in excess of twenty-five (25) pages to thirty-eight (38) pages with affidavit of Morton Stavis, Esq. filed. (5cc)(Service attached).

July 11—Submitted on above motion (Clerk).

July 14—Order (Clerk) continuing the above motion to the merits panel and the attention of counsel is drawn to Rule 28(g), F.R.A.P., as amended August, 1979, filed.

July 15—Submitted on motion by appellant for an order permitting the following relief: (a) leave to file reply brief one-day out of time, (b) leave to file the reply brief in excess of twenty-five pages to thirty-eight pages, with Affidavit of Morton Stavis, Esq. Coram: Gibbons, Weis and Sloviter, C.J.

Relevant Docket Entries

1980

July 24—Supplemental Affidavit of Morton Stavis, Esq., counsel for appellants, in support of appellants' motion for leave to file reply brief in excess pagination filed. (5cc)(Service attached).

July 25—Order (*Gibbons,* Weis and Sloviter, C.J.) granting the motion by appellants for an order permitting the following relief: (a) leave to file reply brief one-day out of time and (b) leave to file the reply brief in excess of twenty-five pages to thirty-eight pages filed.

July 25—Reply brief for appellants, received 7-3-80 filed. (25cc).

Aug. 13—Motion by defendant-appellee for leave to file supplemental brief in response to appellants' reply brief with brief and appendix in support of motion attached (4cc) affidavit attached.

Aug. 15—Submitted on above motion. Coram: Adams, Weis & Sloviter, C.J.

Aug. 20—Order (*Adams,* Weis & Sloviter, C.J.) granting the above motion filed.

Aug. 20—Supplemental brief for defendant-appellee, received 8/13/80 filed (25cc) (Affidavit of service attached to motion to file).

Aug. 22—Order (*Adams,* C.J.) directing 15 minutes oral argument time for each side filed.

Sept. 16—Argued. Coram: Adams, Weis & Sloviter, C.J.

Relevant Docket Entries

1981

Feb. 24—Opinion of the Court (Adams, Weis & *Sloviter,* C.J.), w/concur by Adams, J. and dissent by Weis, J.

Feb. 24—Judgment vacating and remanding filed.

Mar. 10—Petition by appellee for rehearing and suggestion for rehearing en banc, w/service filed (25cc).

Mar. 13—Order (*Sloviter,* C.J.) directing an answer to the petition for rehearing be filed within 14 days of the date of this order filed.

Mar. 27—Response by appellants to appellee's petition for rehearing received in response to the above order filed (25cc) (w/service).

May 12—Order (Seitz, Ch.J., Aldisert, Adams, Hunter, Weis, Higginbotham and Sloviter, C.J.*) denying appellee's petition for rehearing en banc w/opinion of the Court (Adams, Weis and *Sloviter,* C.J.), w/dissent by Weis, J. on denial of rehearing filed). Ch. J. Seitz and Judges Aldisert, Hunter and Weis would grant rehearing.

May 19—Order Seitz, Ch.J., Aldisert, Adams, Hunter, *Weis,* Higginbotham and Sloviter, C.J.*) amending opinion filed.

May 20—Cert. J. in lieu of mandate issued.

May 20—Record, exhibits and 1 supplement returned to C of DC.

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* Judges Gibbons and Garth did not participate in the consideration of this matter.

Relevant Docket Entries

1981

May 20—CC of this Court's order dated 5-19-81 amending opinion to C of DC.

May 26—Receipt of record, exhibits and 1 supplement received from C of DC., filed.

Aug. 3—Copy of letter dated 7-31-81 to counsel for appellee advising the Supreme Court of the United States has extended the time for filing petition for writ of certiorari to 9-9-81 received from the Clerk of the Supreme Court.

Sept. 17—Notice—Petition for writ of certiorari filed 9-5-81 filed (S.C. No. 81-460).

Nov. 5—Order—Certiorari granted 11-2-81 filed (S.C. No. 81-460).

II. Relevant Findings and Opinions

A. Memorandum Opinion of the United States District Court for the District of New Jersey (See App. D to Pet. for Cert., 45a-54a).

B. Letter Opinion of the United States District Court for the District of New Jersey (See App. E to Pet. for Cert., 55a-58a).

III. Opinions, Orders and Judgment in Question

A. Opinion of the United States Court of Appeals for the Third Circuit (See App. A to Pet. for Cert., 1a-30a).

B. Order, Opinion and Amendment of the United States Court of Appeals for the Third Circuit sur Petition for Rehearing (See App. B to Pet. for Cert., 31a-42a).

C. Judgment of the United States Court of Appeals for the Third Circuit (See App. C to Pet. for Cert., 43a-44a).

IV. Relevant Regulatory Provisions

Disciplinary Rules adopted by the Supreme Court of New Jersey, DR1-102(A)(5) and DR7-107(D) (See Pet. for Cert., 3).

V. Relevant Portions of the Certified Record

Verified Complaint

(Filed: February 10, 1978)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

C.A. No. 78-273

GARDEN STATE BAR ASSOCIATION, AND THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, BOTH CORPORATIONS ORGANIZED UNDER THE LAWS OF THE STATE OF NEW JERSEY; NATIONAL CONFERENCE OF BLACK LAWYERS, A CORPORATION ORGANIZED UNDER THE LAWS OF THE DISTRICT OF COLUMBIA, and LENNOX HINDS,

Plaintiffs,

v.

MIDDLESEX COUNTY ETHICS COMMITTEE, AN AGENCY ESTABLISHED BY THE SUPREME COURT OF NEW JERSEY,

Defendant.

Parties

Plaintiffs:

1. Plaintiff Garden State Bar Association (hereinafter referred to as "Garden State") is a corporation organ-

ized under the laws of the State of New Jersey. It is an association largely of black lawyers practicing in the State of New Jersey and is a State affiliate of the National Bar Association, which is a nationwide association largely of black lawyers. The National Bar Association was originally established as an organization of minority lawyers because the American Bar Association discriminated against such lawyers and even refused to admit them to membership. Currently, though that problem has been substantially overcome, the National Bar Association has remained a separate minority bar association for the reason that its members are persuaded that they have a special and unique responsibility to combat racism in the United States and, since they are largely black, they have specific experience with and knowledge of racism. The National Bar Association has affiliates throughout the country. The By-Laws of Garden State include among its objectives the following:

> "[T]o work to eliminate discrimination and inequality based on racial, ethnic or sexual considerations, to the extent that they presently exist in our legal and judicial system."

There are at the present time approximately 260 black lawyers in the State of New Jersey and more than three-quarters of them are members of Garden State.

2. Plaintiff The New Jersey Association of Black Women Lawyers (hereinafter referred to as "Black Women Lawyers") is a corporation organized under the laws of the State of New Jersey. Black Women Lawyers is an affiliate of the National Association of Black Women Attorneys. The members of Black Women Lawyers have formed a separate organization because their members

have knowledge of two of the most insidious forms of discrimination, namely, discrimination against blacks and discrimination against women. Black Women Lawyers considers that it has a special responsibility to combat such discrimination within the State of New Jersey. Its By-Laws include the following among its objectives:

> "To provide a forum for discussion and to disseminate legal information on matters of interest to black attorneys in the legal profession."

3. Plaintiff National Conference of Black Lawyers (hereinafter referred to as the "National Conference") was organized in 1972 and is a national organization of black lawyers dedicated to the elimination of racism in our society. It functions throughout the United States and has members within the State of New Jersey. Its Articles of Incorporation provide, *inter alia,* the following as to its purposes:

> "To work for the elimination of racism in the law."

4. Plaintiff Lennox Hinds resides in Somerset County, New Jersey, is a member of the bar of the State of New Jersey, and is National Director of the National Conference. He is also a member of the bar of this Court, the Third, Fifth and Tenth Circuits of the Court of Appeals, and the Supreme Court of the United States.

Defendant:

5. Defendant Middlesex County Ethics Committee is a body established by the Supreme Court of New Jersey under Rule 1:20-1 of the rules governing the courts of New Jersey. It is empowered under Rule 1:20-2(a) to

"inquire into and consider, any complaint made against any attorney practicing within its county, involving his character, integrity, professional standing or conduct as a member of the bar."

Jurisdiction

6. Jurisdiction is invoked pursuant to 28 U.S.C., §§ 1331, 1343(3) and (4), 2201, and 2202; 42 U.S.C., §§ 1981, *et seq.;* and the Constitution of the United States, and more particularly the First, Fifth, Sixth, Thirteenth, and Fourteenth Amendments thereto.

7. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

Statement of Facts

8. The plaintiff organizations, being dedicated to the exposure and elimination of racism within the State of New Jersey and the United States, engage in a wide variety of activities to that end. Such activities have included the giving of assistance to attorneys involved in the trial of cases and the filing of briefs in court proceedings which present sensitive racial issues. Beyond that, however, and in a manner comparable to the activities of the American Bar Association, the activities of the plaintiff organizations have included educational activities directed both to the bar and the general public, all constituting an exercise of First Amendment rights to freedom of speech. Such activities include the publication of pamphlets, magazines, and house organs and the dis-

tribution of literature; the holding of meetings and conferences, including press conferences; the conduct of seminars, debates, and discussions, and the dissemination to the media of such information as may be necessary to contribute to an understanding by the American people of the insidiousness, persistence and pervasiveness of racism and the need for its elimination from all aspects of our societal structure, with special emphasis upon the legal and judicial structure of the United States.

9. In the course of the performance of the activities aforesaid, plaintiff organizations and their members call upon their special knowledge of the workings of the legal system within the United States and the State of New Jersey and, as members of the bar, recognize a special duty to expose all aspects of racism within the legal and judicial system and to that end employ plain words to express their ideas.

10. In their program to expose and eliminate racism, the members of the plaintiff organizations have always resorted to First Amendment activities. Their program does not include obstruction of the administration of justice, nor do they perceive that their exercise of First Amendment rights to expose and eliminate racism can ever be considered an obstruction of the administration of justice.

11. Plaintiff Lennox Hinds, as National Director of the National Conference, often becomes concerned with legal proceedings throughout the country, presenting issues involving racism. In that capacity, he became concerned with the trial in Middlesex County of Joanne Chesimard, also known as Assata Shakur, charged with the murder

of a white police officer. In the view of the plaintiff National Conference and the plaintiff Lennox Hinds, there were many aspects of racism in the prosecution, trial, and incarceration of Ms. Shakur. Mr. Hinds was not her defense counsel, nor was he associated with the defense, but he did represent her in connection with certain proceedings before the United States District Court for the District of New Jersey in which damages are sought against the Board of Chosen Freeholders of Middlesex County because of the conditions of her incarceration. The trial of that action is set for the Fall of 1978. The said action is entitled "Joanne Chesimard (Assata Shakur) v. Middlesex County Board of Chosen Freeholders," Civil Action No. 76-582.

12. On or about January 20, 1977, plaintiff National Conference, in a manner similar to its practice in respect to innumerable cases in which it has expressed its concern that racial bias had played a part in a legal proceeding, called a press conference in New Brunswick, New Jersey, relating to the prosecution of Ms. Shakur.

13. Plaintiff Hinds, in his capacity as National Director of the National Conference, participated in that press conference and expressed the views of the National Conference as to the racial aspects of the foregoing prosecution.

14. On or about February 24, 1977, a representative of the defendant addressed a communication to plaintiff Hinds in which he stated that he had been "designated to conduct an investigation" of plaintiff Hinds with respect to his comments of January 20 and requested that plaintiff Hinds present himself for a conference. A copy of said letter is annexed hereto as *Exhibit A*.

15. Thereafter there was correspondence between the representative of the defendant and counsel for plaintiff Hinds as to the terms of that conference but, no agreement having been reached, no conference was held. The correspondence terminated in July of 1977.

16. Assata Shakur was convicted by the Middlesex County Court on March 25, 1977, of first degree murder and was sentenced to life imprisonment.

17. During the period of her trial and since her conviction, there has been continued and increasing public concern about the trial and the allegations of racial bias therein. In view particularly of the presence at the trial of representatives of the foreign press, such interest and concern have been growing not only in this country but internationally, as well.

18. In the late Fall of 1977, the National Conference made public the fact that it intended in its capacity as a member of the United Nations, accredited thereto as a non-governmental organization, to bring the Shakur case, and particularly its racial implications, before the 34th session of the U.N. Committee on Human Rights, scheduled to commence its proceedings on February 6, 1978. On information and belief, the plans of the National Conference came to the attention of officials in Middlesex County concerned with law enforcement.

19. Under date of December 29, 1977, ten months after the alleged press conference and five months after the last correspondence on the matter, the defendant Ethics Committee forwarded to the plaintiff Hinds a statement of charges, a copy of which is annexed hereto as *Exhibit B,*

which charged that plaintiff Hinds violated DR 1-102(A) (5) and 7-107(D), as follows:

> "At a press conference conducted on January 20, 1977, during the selection of a jury in the Joanne Chesimard criminal trial, and speaking as a member of the defense team, he termed the trial before Judge Theodore Appleby to be a 'travesty;' he stated that Judge Appleby 'does not have the judicial temperment or racial sensitivity to sit as an impartial judge;' he stated that 'it was only after the trial began that we began to have fears that what we are seeing is a legalized lynching;' he stated that the members of the Joanne Chesimard defense team had been 'gagged' by Judge Appleby; he stated that Judge Appleby was asking prospective jurors self-serving questions which he said were leading to 'the creation of a hangman's court' and he stated that 'it will be a kangeroo court unless the judge recluses [sic] himself' and that a kangeroo court means a guilty verdict.
>
> "The above allegations constitute unethical and unprofessional conduct . . ."

Annexed hereto as *Exhibit C* are the disciplinary rules above referred to.

20. The statement of charges required that an answer be filed within ten days of its service; the time for answering has since been extended to March 10, 1978.

21. The proceedings aforesaid are being carried out in bad faith and without any hope of success. Upon information and belief, the defendant was aware of proceedings

in the Middlesex County Court on January 21, 1977, which established that plaintiff Hinds was not Ms. Shakur's defense counsel nor associated with the defense, but it nevertheless commenced the proceedings aforesaid to achieve one or more of the following objectives:

a) To satisfy the wishes of the judge who sat upon the trial of Assata Shakur and who considered himself personally offended by the comments of the plaintiff Hinds but had no power to act against him because the plaintiff Hinds was not involved in the defense of Ms. Shakur;

b) To prevent participation by lawyers in increasing public discussions of some of the racial issues in the Shakur case, even though it is clear that lawyers might be far more knowledgeable than would members of the general public on such issues;

c) To curb the plaintiff National Conference from its continued activities in respect to publicizing the Shakur case and in particular to curb or limit its presentation of the said case to the United Nations;

d) To curb plaintiffs Hinds from his continued pressing of the civil action against the Board of Chosen Freeholders of Middlesex County, in which he appeared as counsel for Ms. Shakur and obtained a favorable ruling from the District Court, granting a preliminary injunction and ordering an administrative hearing as to the reasons for her confinement in the County jail.

22. The effect of the filing of the charges aforesaid has been immediately to communicate to the black lawyers who are members of all the plaintiff organizations that if they carry out the objectives of their organizations to expose racism in the United States and use such language as they

deem necessary or appropriate fully to express their views, they do so at their peril. The filing of such charges has accordingly had a chilling effect upon the members of all the plaintiff organizations and has curbed and, unless enjoined by this Court, will continue to curb them from making such expressions as are necessary to disseminate their views as to racism, and from advancing the public's knowledge of the existence of racism within the legal processes of the State of New Jersey.

23. As a result of the foregoing, the plaintiff organizations are immediately and directly impeded in the carrying out of a major portion of their lawful objectives, namely, to expose racism in all its manifestations, including such as may be found in the legal system.

Causes of Action

First Cause of Action

24. The actions of the defendant Ethics Committee herein have the purpose and/or effect of interfering with the exercise by the plaintiff organizations and their members and the individual plaintiff herein of their fundamental rights of free speech, assembly, and association, as well as their right, and duty, to eliminate racism within the United States as a vestige of slavery, in violation of the First, Thirteenth, and Fourteenth Amendments to the Constitution of the United States.

25. The actions of the defendant Ethics Committee in respect to the filing of the disciplinary proceeding hereinabove referred to are unconstitutional and the said proceeding has been instituted in bad faith, for no reason re-

lated to the needs of the administration of justice, and without reasonable expectation of eventual success because the disciplinary rules referred to are on their face unconstitutional, but said proceeding has nevertheless been instituted for the sole and only purpose of having an immediate chilling effect on the exercise by plaintiffs and the members of plaintiff organizations of their most fundamental right of expression, as guaranteed by the First and Fourteenth Amendments, and in order immediately to interfere with the continued activities of the plaintiffs and the members of the plaintiff organizations to expose racism within the legal and judicial system of the State of New Jersey, all without regard to the fact that ultimately the proceedings and the disciplinary rules upon which they are founded are unconstitutional.

26. The actions of the defendant Ethics Committee interfere with the Sixth Amendment rights of clients of the members of the plaintiff organizations and of the individual plaintiff in that the said actions have the purpose and/or effect of curbing vigorous advocacy by counsel in unpopular causes. The plaintiffs have a lawful interest in protecting the exercise of the foregoing Sixth Amendment privilege.

27. Plaintiff organizations are not parties to, or involved with, or subject to, the proceeding before the defendant Ethics Committee. Nevertheless, for the reasons above stated, they are directly impeded in the carrying out of their functions by the proceedings presently pending before that body in respect to the plaintiff Hinds.

28. Unless this Court restrains and enjoins the defendant Ethics Committee from further proceedings upon the complaint filed by it,

a) The plaintiff organizations and their members will suffer and continue to suffer serious, immediate and irreparable injury in that continuance of the said proceeding will have the effect of interfering with the carrying out of the programs of each of the plaintiff organizations to expose racism, including such as may be found in the legal system, and the impact of the continuance of said disciplinary proceeding is unaffected by the prospect of the ultimate failure of such proceeding; either before the defendant Ethics Committee or on appeal to the Supreme Court of New Jersey or the Supreme Court of the United States. The threat of this proceeding has already had and will continue to have an immediate and irreparable chilling effect upon the exercise of basic First Amendment freedoms and will deter the plaintiff organizations, their members, and other American citizens from exercising those inalienable rights.

b) Plaintiff Hinds will suffer serious and irreparable injury to his professional reputation as a lawyer, solely because he has exercised his constitutional rights, and he will be subjected to public scorn, censure, and ridicule on that account, and he and his organization will be obstructed in their intended presentation of the Shakur case to the Human Rights Committee of the U.N. All the foregoing injury is unaffected by the prospect of the ultimate failure of the disciplinary proceeding either before the defendant Ethics Committee or on appeal to the Supreme Court of New Jersey or the Supreme Court of the United States. The disciplinary proceedings are intended to and/or did have the effect of deterring plaintiff Hinds and other American lawyers similarly situated from exercising their First and Sixth Amendment rights.

29. Neither the plaintiff organizations nor the plaintiff Hinds have available to them any realistic remedy within the legal machinery of the State of New Jersey for the following reasons:

a) As to the plaintiff organizations, they are not parties to the proceedings before the defendant Ethics Committee nor does the defendant Ethics Committee have jurisdiction with respect to their interest;

b) As to all of the plaintiffs, since one of the bases of their claim is that the rules sought to be enforced by the defendant Ethics Committee are unconstitutional on their face, and since such rules were promulgated by the Supreme Court of New Jersey, it would be a futile gesture to request the Ethics Committee, which was created by the said Court, or the said Court itself, to declare its own pronouncement to be unconstitutional.

30. Plaintiffs have no adequate remedy at law.

31. No previous application for the relief sought herein has been made to this or any other court.

Second Cause of Action

32. Plaintiffs repeat the allegations of ¶¶ 1 through 34 as if the same were fully set forth herein.

33. The actions of the defendant Ethics Committee purport to be based upon certain disciplinary rules adopted by the Supreme Court of New Jersey, namely, DR 1-102 (A)(5) and DR 7-107(D), copies of which are annexed hereto as *Exhibit C*. The said disciplinary rules, on their face and as applied in the proceeding hereinabove referred

to, are void and illegal for the following reasons, among others:

a) They violate the fundamental guarantees of freedom of religion, freedom of speech, freedom of the press, freedom of assembly, freedom of association, and freedom of thought and belief, all of which are guaranteed by the First Amendment.

b) They are overbroad and vague, indefinite and imprecise, in violation of the First and Fourteenth Amendments. Their overbroad sweep inhibits and deters the exercise of the rights of freedom of religion, speech, press, assembly, and thought and belief, all in violation of the First Amendment. Their overbreadth creates a chilling effect upon the exercise of First Amendment rights by all of the plaintiffs herein.

c) They violate, on their face, the guarantees of Due Process of Law contained in the First and Fourteenth Amendments in that their provisions are vague and indefinite and fail to meet the requirements of certainty in statutes which are enforced by criminal or quasi-criminal sanctions.

d) They violate the Equal Protection Clause of the Fourteenth Amendment.

e) They contain a broad and pervasive proscription of speech with respect to matters in litigation generally without a finding that in a particular case such a proscription is necessary and justified upon some acceptable constitutional standard which defines a serious and imminent threat to the administration of justice.

f) They constitute a broad and pervasive proscription of speech without resort to less drastic means for achieving non-interference with the administration of justice.

g) They constitute an impermissible standard for regulating speech.

WHEREFORE, plaintiffs demand judgment, as follows:

A. That as to the First Cause of Action a temporary and permanent injunction issue:

1) Restraining defendant, its agents, employees and attorneys, and all others acting in concert with it, and its successors, from impeding, intimidating, hindering and preventing plaintiffs in any way or manner whatsoever from exercising the rights, privileges and immunities guaranteed to them by the Constitution and laws of the United States, including their making public comment about the Assata Shakur case.

2) Restraining the defendant, its agents, employees and attorneys, and all others acting in concert with it, and its successors, from continuing disciplinary proceedings against the plaintiff Hinds by reason of his making or having made public comment about the Assata Shakur case on or about January 20, 1977, or otherwise.

3) Ordering and directing defendant, its agents, employees and attorneys and all others acting in concert with it, and its successors, to discontinue forthwith any disciplinary proceedings currently pending against the plaintiff Hinds on the basis of his alleged statement about the Assata Shakur case, and to expunge from his record any references whatsoever to the said disciplinary proceedings or the reasons therefor.

B. As to the Second Cause of Action, that a declaratory judgment issue, declaring that disciplinary rules 1-102

(A)(5) and 7-107(D), adopted by the Supreme Court of New Jersey, are unconstitutional on their face.

C. That this Court grant plaintiffs such other and further relief as may seem to it to be appropriate.

Respectfully submitted,

Attorneys for Plaintiffs

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(201) 622-3789
By: BERNARD K. FREAMON AQS
MORTON STAVIS

[EXHIBIT A omitted; printed as Exhibit 4 *infra.*]

Verified Complaint

EXHIBIT B

MIDDLESEX COUNTY ETHICS COMMITTEE

IN THE MATTER OF THE ALLEGED UNETHICAL MISCONDUCT OF LENNOX HINDS, ESQ., An Attorney at Law of New Jersey.

STATEMENT OF CHARGES

DAVID M. FOLEY, a member of the Middlesex County Ethics Committee having conducted a preliminary investigation into the alleged unethical conduct on the part of Lennox Hinds in connection with certain improper and unethical statements made by Mr. Hinds at a press conference on or about January 20, 1977, and

The Middlesex County Ethics Committee, based upon the investigation and report of David M. Foley, being of the opinion that a complaint and specifications of charges should be prepared and served upon Lennox Hinds in connection with this matter;

NOW, THEREFORE, the Middlesex County Ethics Committee does hereby allege that the said Lennox Hinds did violate DR 1-102(A)(5) and DR 7-107(D) as follows:

At a press conference conducted on January 20, 1977, during the selection of a jury in the Joanne Chesimard criminal trial, and speaking as a member of the defense

team, he termed the trial before Judge Theodore Appleby to be a "travesty"; he stated that Judge Appleby "does not have the judicial temperament or racial sensitivity to sit as an impartial judge"; he stated that "it was only after the trial began that we began to have fears that what we are seeing is a legalized lynching"; he stated that the members of the Joanne Chesimard defense team had been "gagged" by Judge Appleby; he stated that Judge Appleby was asking prospective jurors self-serving questions which he said were leading to "the creation of a hangman's court" and he stated that "it will be a kangeroo court unless the judge recluses himself" and that a kangeroo court means a guilty verdict.

The above allegations constitute unethical and unprofessional conduct and the said Lenox Hinds is hereby required to file his answer to the charges and specifications within ten days of his receipt of the same with the Secretary of the Middlesex County Ethics Committee, Mathias D. Dileo, Esq., Route 9, Woodbridge, New Jersey 07095.

MIDDLESEX COUNTY ETHICS COMMITTEE
By: DAVID M. FOLEY

Dated: December 22, 1977

[EXHIBIT C omitted, printed as Relevant Regulatory Provisions *ante*.]

[Verifications of Arthur Martin, Esq., Irene Jones, Esq., and Phillip John, Esq. omitted in printing.]

Verified Complaint

STATE OF NEW JERSEY, }
COUNTY OF SOMERSET, } ss.:

LENNOX S. HINDS, being of full age and being duly sworn according to law, upon his oath deposes and says:

1. I am a plaintiff in the foregoing complaint, a true copy of which is annexed hereto.

2. I have read the allegations contained in the foregoing complaint and all of the allegations insofar as they pertain to myself are true to the best of my knowledge, information and belief.

3. Items alleged on information and belief are believed to be true.

4. I make this verification in support of my attorneys' application for all lawful relief demanded in the complaint.

LENNOX S. HINDS

[JURAT OMITTED IN PRINTING.]

Answer

(Filed—March 23, 1978)

[Caption Omitted in Printing]

Defendant, Middlesex County Ethics Committee, with offices located at 96 Bayard Street, City of New Brunswick, County of Middlesex, State of New Jersey, by way of answer says that:

1. It is without information sufficient to form a belief with respect to the truth of the factual allegations set forth in paragraphs 1, 2 and 3 of the complaint.

2. It is without information sufficient to form a belief with respect to the truth of the factual allegations set forth in paragraph 4 of the complaint, except that it is admitted that Lennox Hinds is a member of the bar of the State of New Jersey.

3. It admits the allegations contained in paragraph 5 of the complaint.

4. It denies jurisdictional allegations contained in paragraphs 6 and 7 of the complaint.

5. It is without information sufficient to form a belief with respect to the truth of the factual allegations set forth in paragraphs 8, 9 and 10 of the complaint.

6. It denies the truth of the allegations contained in paragraph 11 of the complaint insofar as it is contended that plaintiff Lennox Hinds was acting in the capacity of Director of the National Conference and was not associated with the defense of Joanne Chesimard in her trial for the murder of a white policeman in Middlesex County.

Answer

7. It admits that it has knowledge of a press conference which was held on January 20, 1977 concerning the trial of Ms. Chesimard, but denies that this conference was called by the plaintiff National Conference as contended in paragraph 12 of the complaint.

8. It denies the truth of the allegation contained in paragraph 13 of the complaint.

9. It admits the allegation contained in paragraph 14 of the complaint.

10. It admits the allegation contained in paragraph 15 of the complaint.

11. It admits the allegation contained in paragraph 16 of the complaint.

12. It is without information sufficient to form a belief with respect to the truth of the factual allegations set forth in paragraph 17 of the complaint.

13. It is without information sufficient to form a belief with respect to the truth of the factual allegations set forth in paragraph 18 of the complaint.

14. It admits the allegation contained in paragraph 19 of the complaint.

15. It admits the allegation contained in paragraph 20 of the complaint, with the addendum that the time for answering has been extended until the court considers the merits of plaintiffs' motion for a preliminary injunction.

Answer

16. It denies the allegations contained in paragraph 21 of the complaint in its entirety.

17. It denies the allegations contained in paragraph 22 of the complaint.

18. It denies the allegations contained in paragraph 23 of the complaint.

19. Insofar as the "Causes of Action" set forth in paragraphs 24 through 33 contain factual allegations they are hereby denied.

FIRST AFFIRMATIVE DEFENSE

This Court lacks Jurisdiction over the subject matter.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a cause of action upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Certain party plaintiffs, namely the Garden State Bar Association, the New Jersey Association of Black Women Lawyers and the National Conference of Black Lawyers are not the subject of an investigation by defendant and have no interest in the subject matter of this dispute.

FOURTH AFFIRMATIVE DEFENSE

No disciplinary action has been taken against plaintiff Lennox Hinds and thus this action is premature and not ripe for judicial review by the federal court.

FIFTH AFFIRMATIVE DEFENSE

Disciplinary Rules 1-102 and 7-107D promulgated by the New Jersey Supreme Court, are a legitimate exercise of the Court's authority to promulgate guidelines governing the conduct of members of the bar pursuant to New Jersey Constitution Art. 6, §1, ¶1 *et seq.*

SIXTH AFFIRMATIVE DEFENSE

Conformance with the Disciplinary Rules promulgated by the New Jersey Supreme Court is a legitimate condition to practice law for a member of the New Jersey bar.

SEVENTH AFFIRMATIVE DEFENSE

Principles of federalism, comity, and equity require that the federal courts restrain from exercising their jurisdiction to interfere with an ongoing state court disciplinary proceeding involving allegations of improper conduct by a New Jersey attorney and because plaintiffs have failed to demonstrate any extraordinary circumstances which would justify federal intrusion.

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for Defendant
Middlesex County Ethics Committee
By STACY L. MOORE, JR.
Deputy Attorney General

Plaintiffs' Notice of Motion for a Preliminary Injunction

(Filed—April 20, 1978)

[Caption Omitted in Printing]

To: Hon. Clarkson S. Fisher
Judge, U.S. District Court
Courthouse & P.O. Bldg.
Trenton, N.J. 08605

John J. Degnan, Att. General
State House Annex
Trenton, N.J. 08625
Attn: Stacy L. Moore, Jr.

Sirs:

Please Take Notice that the plaintiffs in the above matter will move this Court on Monday, May 15, 1978, at 9 a.m. for a preliminary injunction restraining the defendants, its agents, employees and attorneys, and all others acting in concert with it, and its successors, from continuing disciplinary proceedings against the plaintiff Hinds, by reason of his making or having made, public comment, about the Assata Shakur case, on or about January 20, 1977, or otherwise, pending trial and judicial resolution of the matters raised by the complaint and answer filed in this matter.

Counsel shall rely upon the annexed affidavits of Dr. George Jackson and Dr. Craig Polite, and brief filed herewith, together with the Verified Complaint, previously filed, and Rule 65 of the Federal Rules of Civil Procedure.

Bernard K. Freamon
Attorney for Plaintiff Lennox Hinds

Dated: 4/18/78

Affidavit of Dr. George Jackson

(Filed—April 20, 1978)

[Caption Omitted in Printing]

State of New Jersey, }
County of Essex, } ss.:

I, Dr. George Jackson, being duly sworn according to law, upon oath do depose and say:

1. I am a trained clinical psychologist, having received a Bachelor of Arts degree from Rutgers University, a Masters degree in Educational Psychology from New York University School of Education, and a Ph.D. in Clinical Psychology from New York University Graduate College of Arts and Sciences. I was licensed by the State of New Jersey in 1969 and the District of Columbia in 1977.

2. I am currently Chairman of the Human Behavior Department of Howard University School of Social Work. Previously, I served as a Prison Psychologist for seven years. I maintain a private practice in both New Jersey and Washington, D.C. I am currently National Chairman of Political Activities for the Association of Black Psychologists. I am a past National Chairman of the Association of Black Psychologists. I am a member of the American Psychological Association and the New Jersey State Psychological Association. I have published articles in the American Psychologist and the Journal of Contemporary Psychology.

3. In preparing this affidavit for use in this case, I have been asked by counsel for plaintiffs to consider the following set of facts:

Affidavit of Dr. George Jackson

a. The Garden State Bar Association, the New Jersey Association of Black Women Lawyers and the National Conference of Black Lawyers are all bar associations composed primarily of black attorneys and in some cases black law students.

b. The above-mentioned bar associations are dedicated to the exposure and elimination of racism within the State of New Jersey and the United States, with special emphasis upon the legal and judicial structure.

c. Lennox Hinds is a black attorney and the Executive Director of the National Conference of Black Lawyers.

d. In the performance of the Association's responsibilities, members of the National Conference of Black Lawyers, including Lennox Hinds, observed and monitored the developments relating to the prosecution of Assata Shakur (Joanne Chesimard), a black woman charged with the murder of a white police officer.

e. As a consequence of its observations, the National Conference of Black Lawyers called a press conference during the trial in New Brunswick, New Jersey, at which Lennox Hinds, as Executive Director of the National Conference of Black Lawyers and spokesman thereof, participated and expressed the views of the National conference as to aspects of perceived racism in the Chesimard prosecution.

f. At the press conference, Lennox Hinds stated that the trial was a travesty; that the presiding judge did not have the judicial temperament or racial sensitivity to sit as an impartial judge; that it was only after the trial began that the organization began to have fears that it was seeing a legalized lynching; that members of the de-

fense team had been gagged by the judge; that the questions posed by the judge to the jurors were leading to the creation of hangman's court; and that the result would be a kangeroo court unles the judge recused himself.

g. The Middlesex County Ethics Commitee, an agency established by the Supreme Court of New Jersey responsible for monitoring the professional conduct of attorneys, empowered to recommend disbarment, suspension or other sanctions against attorneys for unprofessional conduct, has charged Lennox Hinds with unethical and unprofessional conduct because of his alleged statements.

h. The activities of the Garden State Bar Association, the New Jersey Association of Black Women Lawyers and the National Conference of Black Lawyers, in a manner comparable to the activities of the American Bar Association, are educational in thrust and directed both to the bar and the general public.

i. Organizational activities include publication of materials and its distribution as well as that of other literature; the holding of meetings and conferences, including press conferences; the conduction of seminars, debates, and discussions, and the dissemination to the media of such information as may be necessary to contribute to an understanding by the American people of the pervasiveness of racism and the need for its elimination from all aspects of our societal structure.

j. The involved organizations, as well as Lennox Hinds, express concern that a continuance of the prosecution by the Ethics Committee will significantly impede the organizations from attaining their avowed purposes by inhibit-

ing the individual members from participating in their activities for fear of retribution. Fear has also been expressed that new potential members and the general public as well will be deterred from participating in activities conducted by these organizations.

4. As a result of the facts described in Paragraph 3 above it is my opinion that:

a. In terms of conformity, results differ when people perceive what happens to a person with status similair to their own and when they perceive what happens to a person whom they perceive to be a leader.

b. Conformity is brought about through the perceptions of what people hear of what happens to their leaders:

a. If the leader moves in a certain direction and there are positive results, in terms of the goals which the individuals in the group have, then they will follow that leader.

b. If the leader gets into difficulty or the individuals in the group feel their goals will not be achieved because of what they see happen to the leader, then individuals tend to move away from that leader.

c. The dynamics are such that when a black person, especially a leader, stands accused and is on trial, the desire to shy away exists.

d. Policymakers recognize the validity of these social dynamics; social scientists have published informative discourse on this subject.

e. Samuel Yette has documented the manner in which certain governmental agencies attempted to make black people appear not only as victims but inadequate as well, with the belief that once a people are convinced that such is the case, then certain kinds of atrocities can be performed against them with the acceptance of the public.

f. The impact of imposing a penalty on Lennox Hinds, as a black lawyer, can certainly affect black professional organizations. Their members consider very carefully the difficulty which Lennox Hinds has encountered and consider the probability of what could happen to them, they will tend not to engage in similar conduct, even if they feel he was correct.

g. The above paragraphs takes note of the following:

a. Cognitive dissonance exists as a disparty between one's values and one's behavior. When there is a disparity of this type, one will frequently try to bring harmony between his values and his behavior by blaming the victim for the behavior which the observer would like to imitate. Consequently the average persons, particularly those in minority groups, may attempt to close this gap by blaming Mr. Hinds, although they may have the same values which he has expressed.

b. The tendency toward conformity is developed in terms of what happens to leadership. One evaluates what happens to his leaders and governs his own conduct in accordance with what happens to the leadership.

c. The theory of identification with the aggressor, i.e., people who take on the characteristics of those

who dominate the society in order to protect themselves, is also appropriate here.

h. The mere fact that Lennox Hinds is going through his disbarment proceeding, regardless of whether or not he is eventually vindicated, has a detrimental effect because not only upon black attorneys but other blacks as well. In general, blacks will be evaluating the situation whether Lennox Hinds wins or loses in an effort to protect themselves, especially in terms of the legal consequences to themselves.

i. Research I have performed reveals that in the 1960's blacks felt that affiliation with power groups was a better way to move up rather than going by one's self; but, today blacks are more inclined to work by themselves because they feel that groups are not able to protect individual interests. The reasons for this change are:

1. The failure of group dynamics to attain expected results.
2. The collapse of group dynamics.
3. Group harrassment.
4. The tendency to punish group individuals by economic sanctions.

j. Today, there is a tendency on the part of blacks to diversify and reject group dynamics.

k. When a black person accuses a white person of being insensitive to blacks, other whites will more than likely emphathize with the accused.

Affidavit of Dr. George Jackson

l. When the black populous hears, from people like Lennox Hinds, that the judge involved in a national trial of a black person lacks the racial sensitivity to meet out justice and that they may be witnesses a kangaroo court, this raises in the minds of the members of the black community as issue as to whether or not fairness is in fact being meted out by the court. But, blacks would not be more inclined to come and witness the trial for they would probably feel that there actually is insensitivity in the courts and they don't need to be there.

m. And, yet assuming there is value in one having a public trial, our salvation rests upon the ability of black leadership to exhort other blacks to attend trials where race has been placed in issue.

n. Black lawyers as a class are more likely to be intimidated, than black non-lawyers by this prosecution because, one of their own is being punished and less likely to engage in similar activities.

o. Penalties imposed on Lennox Hinds will an impact on the organizations' ability to raise funds and to carry out their programs, to the detriment of Blacks as a class.

GEORGE JACKSON

[Jurat omitted in printing.]

Affidavit of Craig Polite

(Filed—April 20, 1978)

[Caption Omitted in Printing]

State of New York }
County of New York } ss.:

I, Craig Polite, being duly sworn, according to law, upon my oath, depose and say:

1. I am a trained psychologist, having received a Bachelor of Arts Degree in psychology in 1969 from the University of Toledo, a Master of Arts Degree in psychology in 1971 and a Doctor of Philosophy Degree in social psychology in 1972, both from Michigan State University.

2. I am currently self-employed in the private practice of clinical psychology and am further employed as consultant and treatment director at Boys Harbor, Inc. and consultant to the National Association for the Advancement of Colored People's Legal Defense Fund. In addition, I am presently engaged in the New York University post doctoral program in psychoanalysis.

3. From 1972 to 1976 I was Assistant Professor of Psychology at the State University of New York at Stony Brook at which I taught at both the graduate and undergraduate levels, monitored and supervised doctoral research, and conducted research in attitudes and racial identity.

4. My Masters thesis was written on black self concepts; while my doctoral thesis was written on the capability of blacks to influence other people.

5. During the period of 1974 to 1976, I was a member of the house staff at Metropolitan Hospital located in New York City at which my responsibilities included group and individual psychotherapy, diagnostic testing and research supervision.

6. From 1975 to 1977, I engaged in post doctoral work at the National Institute for the Psychotherapies in New York City during which time I studied intensive psychotherapy and psychoanalysis.

7. I am a member of the American Psychological Association, the New York State Psychological Association, and the New York Association of Black Psychologists.

8. In preparing this affidavit for use in this case, I have been asked by counsel for plaintiffs to consider the following set of facts:

a. The Garden State Bar Association, the New Jersey Association of Black Women Lawyers and the National Conference of Black Lawyers are all bar associations composed primarily of black attorneys and in some cases black law students.

b. The above-mentioned bar associations are dedicated to the exposure and elimination of racism within the State of New Jersey and the United States, with special emphasis upon the legal and judicial structure.

c. Lennox Hinds is a black attorney and the Executive Director of the National Conference of Black Lawyers.

d. In the performance of the Association's responsibilities, members of the National Conference of Black Law-

yers, including Lennox Hinds, observed and monitored the developments relating to the prosecution of Assata Shakur (Joanne Chesimard), a black woman charged with the murder of a white police officer.

e. As a consequence of its observations, the National Conference of Black Lawyers called a press conference during the trial in New Brunswick, New Jersey, at which Lennox Hinds, as Executive Director of the National Conference of Black Lawyers and spokesman thereof, participated and expressed the views of the National Conference as to aspects of perceived racism in the Chesimard prosecution.

f. At the press conference, Lennox Hinds stated that the trial was a travesty; that the presiding judge did not have the judicial temperament or racial sensitivity to sit as an impartial judge; that it was only after the trial began that the organization began to have fears that it was seeing a legalized lynching; that members of the defense team had been gaged by the judge; that the questions posed by the judge to the jurors were leading to the creation of hangman's court; and that the result would be a kangeroo court unless the judge recused himself.

g. The Middlesex County Ethics Committee, an agency established by the Supreme Court of New Jersey responsible for monitoring the professional conduct of attorneys, empowered to disbar, suspend or otherwise sanction attorneys for unprofessional conduct, has charged Lennox Hinds with unethical and unprofessional conduct because of his alleged statements.

h. The activities of the Garden State Bar Association, the New Jersey Association of Black Women Lawyers

and the National Conference of Black Lawyers, in a manner comparable to the activities of the American Bar Association, are educational in thrust and directed both to the bar and the general public.

i. Organizational activities include publication of materials and its distribution as well as that of other literature; the holding of meetings and conferences, including press conferences; the conduction of seminars, debates, and discussions, and the dissemination to the media of such information as may be necessary to contribute to an understanding by the American people of the pervasiveness of racism and the need for its elimination from all aspects of our societal structure.

j. The involved organizations, as well as Lennox Hinds, express concern that a successful prosecution by the Ethics Committee will significantly impede the organizations from attaining their avowed purposes by inhibiting the individual members from participating in their activities for fear of retribution. Fear has also been expressed that new potential members and the general public as well will be deterred from participating in activities conducted by these organizations.

9. As a result of the facts described in Paragraph 7 above, it is my opinion that:

A. The associations embroiled in this conflict and their members will question the providence and wisdom of speaking out on racial issues involving the law, regardless of the truth of the allegations. The foundation for this statement is two-fold.

Affidavit of Craig Polite

a. Elementary social learning theory teaches that if A engages in specific and identifiable conduct and is penalized as a consequence of his conduct, then B, an observer of both conduct and penalty, will be deterred from engaging in similar conduct for fear of punishment.

b. On the other hand, clinical experience teaches that the path of lesser resistance will frequently be taken when one is confronted with the possibility of the imposition of censure for having deviated from established norms—even when an egregious wrong has been perpetrated. Little may be done to right the wrong when one who addresses it has been punished.

B. Because associations of professional minority group members tend to seek approval by other majority group counterparts, prosecution of one of its officers or members by the agency responsible for monitoring the character, conduct and integrity of the professional membership creates the fear of rejection by the entire panorama of participants and supporters. Such supporters include funding institutions, membership, and the constituency they feel obligated to serve as well.

C. An ordered society tends to obfuscate differences. Our society has witnessed the straightening of hair, the bobbing of noses, and cosmetic alterations in general of the human body when no physical impediment exists. In large measure, our society is intolerant of individual differences.

D. To speak out on racial issues directs attention to human differences and therefore the prosecution of statements addressing issues of race is often motivated by this

discerned intolerance of individual differences. To be intolerant in this instance becomes a euphemism for hostility.

E. Race, as a consequency of slavery, escalates this hostility for it carries with it the shame and disgrace of the "peculiar institution", and stands as a constant living reminder of its past existence.

F. The prosecution of Mr. Lennox Hinds for addressing his perceptions of racism in the trial of Assata Shakur, in part, takes in account a desire on the part of the Ethics Committee to cloak the legal profession with an aura of sanctuary, separate from the realities of the society's hostility toward race and racial issues.

G. Mr. Lennox Hinds may not ordinarily be a victim of his own racial identity as a black man; but because the content of his speech casts aspersions on this "aura of legal sanctuary" from issues of race, he becomes the victim of "racial hostility."

H. The membership of the organizations about which we are here concerned see that the true sanction is inveighed against the very purpose for which they exist: to disclose and attack evidenced racial hostility throughout our society. And, because they believe at a very basic level of thought processing that if others follow the lead of plaintiff Hinds, social ostracism will ensue.

I. Further, blacks who have been taught that their difference is in fact a sign of inferiority adopt the notion that the best defense is a good offense. Heeding the reinforcement contingencies, many black legal practition-

ers may adopt a more intolerant posture towards difference than their white counterparts. The enslaved overseer was often more harsh than the white master. Defense against racism can take on all of the attributes of any offense, and although many blacks might appear to be in accord with an imposed sanction against connecting racism with the legal system, they are actually doing no more than employing a sophisticated defense against the chances of their being prosecuted.

J. In my opinion, the overall effect will be to cause the organizations to lose financial support for their programs in some cognizable measure; their ability to attract new members will become more difficult, and the ability of these organizations to persuade others that racism does exist in our society and the legal system will suffer noticeable impairment.

CRAIG K. POLITE, PhD

[JURAT OMITTED IN PRINTING]

Defendant's Notice of Cross-Motion to Dismiss Complaint or for Summary Judgment and for a Stay of Discovery

(Filed—May 5, 1978)

[Caption Omitted in Printing]

To: Clerk of the Court
Morton Stavis, Esq.
744 Broad Street
Newark, New Jersey 07102

Sirs:

Please Take Notice that the undersigned, attorney for the defendant, Middlesex County Ethics Committee, will move before the Honorable Clarkson S. Fisher, Judge of the Federal District Court, on May 15, 1978, to dismiss the complaint pursuant to F.R.C.P. 12(b) on the grounds that the federal court should abstain from this matter and on the grounds that the complaint fails to present a substantial federal constitutional question, or for summary judgment pursuant to F.R.C.P. 56(b). In addition, the Middlesex County Ethics Committee will move for a stay of discovery pending disposition of its Motion to Dismiss or for Summary Judgment and/or quashing of the Notice to Take Depositions and the Subpoena Duces Tecum. In support of this motion defendant will rely upon the enclosed brief and affidavits.

John J. Degnan
Attorney General of New Jersey
Attorney for Defendant
By Stacy L. Moore, Jr.
Deputy Attorney General

Dated: May 4, 1978

Affidavit of Stacy Moore, Jr., Esq.

(Filed—May 5, 1978)

[Caption Omitted in Printing]

State of New Jersey,
County of Mercer, } ss.:

I, Stacy L. Moore, Jr., being duly sworn according to law, upon my oath hereby depose and say:

1. I am an Attorney-at-Law licensed to practice in the State of New Jersey before the State and the Federal District Court.

2. I am currently representing the defendant Middlesex County Ethics Committee in the above related matter.

3. On April 27, 1978 a Subpoena Duces Tecum was served upon David Foley, Esq., a member of Defendant Committee demanding production of

> "all files, papers, documents, records, memoranda, minutes of meetings, and notes of conversations relating to the initiation, processing, investigation, and decision to prosecute any complaint or proceeding by the Middlesex County Ethics Committee against Lennox Hinds."

The Subpoena was returnable on May 8, 1978 in a law office in New Brunswick.

4. On or about May 1, 1978 this office was served with a Notice to Take Depositions of David M. Foley, Esq. and Edward J. Barone, Esq. on May 8, 1978 in a law office in New Brunswick.

Affidavit of Stacy Moore, Jr., Esq.

5. There is presently pending a Motion by plaintiffs for a temporary injunction and a Motion by defendant for Dismissal of the Complaint or for Summary Judgment. These Motions will be heard on Monday, May 15, 1978. In my opinion the court's decision in regard to these Motions will obviate the need for discovery in this matter and render any discovery taken a needless and unwarranted expense.

6. Furthermore, the materials demanded by the Subpoena Duces Tecum and information demanded from witnesses at depositions may constitute privileged information not subject to discovery.

7. I respectfully offer this affidavit in support of my Motion for a Stay of Discovery in this matter, pending this Court's decision on the merits of plaintiffs' and defendant's Motions.

STACY L. MOORE, JR.

[JURAT OMITTED IN PRINTING.]

Affidavit of David M. Foley, Esq.

(Filed—May 5, 1978)

[Caption Omitted in Printing]

State of New Jersey, }
County of Middlesex, } ss.:

I, David M. Foley, being duly sworn according to law, upon oath do depose and say:

1. I am an Attorney-At-Law licensed to practice in the State of New Jersey.

2. I am currently serving on the Middlesex County Ethics Committee and have done so since my appointment by the Supreme Court in 1976.

3. I am familiar with the case currently pending before the Middlesex County Ethics Committee involving Lennox Hinds, Esq.

4. Subsequent to the Hinds' news conference of January 20, 1977 I was assigned by the Middlesex County Ethics Committee to conduct the Preliminary Investigation of the Hinds matter, which resulted in the Statement of Charges filed against him.

5. I have read the Counterstatement of Facts contained in the Defendant's brief and the facts concerning the actions taken by me and the Middlesex County Ethics Committee are true to the best of my knowledge and belief.

David M. Foley, Esq.

[Jurat omitted in printing.]

Order

(Filed—June 20, 1978)

[Caption Omitted in Printing]

This matter having been opened to the Court on May 15, 1978 by motion for preliminary injunction made by Bernard K. Freamon, Esq., Lewis Myers, Esq., Alfred A. Slocum, Esq. and Morton Stavis, Esq., attorneys for the plaintiffs herein, and by cross-motion for dismissal of the complaint made by Stacy L. Moore, Jr., Deputy Attorney General, for the defendant Middlesex County Ethics Committee, and the court having considered same;

It is on this 20th day of June, 1978, for the reasons stated in the Memorandum Opinion filed June 6, 1978, hereby

Ordered that plaintiffs' motion for a preliminary injunction be and is denied, and it is

Further ordered that defendant's motion for dismissal of the complaint be and is granted.

Honorable Clarkson S. Fisher, U.S.D.J.

Motion to Alter or Amend Judgment Under Rule 59(e)

(Filed—June 28, 1978)

[Caption Omitted in Printing]

Pursuant to Rule 59(e), the plaintiffs herein move to alter or amend the judgment of the Court as it appears in the Order of the Court dated June 20, 1978, so as to provide for an evidentiary hearing on the issue of the allegations of the plaintiffs that the defendant acted in bad faith.

In support of the said motion, plaintiffs rely on the affidavit of Lennox S. Hinds annexed hereto and the memorandum submitted herewith.

Dated: Newark, N. J.
June 28, 1978.

Bernard K. Freamon
c/o Urban Legal Clinic,
Rutgers University School of Law
175 University Avenue
Newark, N. J. 07102

Lewis Myers, Jr.
c/o Natl. Conference of Black Lawyers
P.O. Box 327
Oxford, Miss. 38655

Alfred A. Slocum
180 University Avenue
Newark, N. J. 07102

Morton Stavis
c/o Center for Constitutional Rights
744 Broad Street
Newark, N. J. 07102
(201) 622-3789
Attorneys for Plaintiffs
By: Morton Stavis

Affidavit of Lennox Hinds, Esq.

(Filed—June 28, 1978)

[Caption Omitted in Printing]

State of New Jersey }
County of Essex } ss.:

Lennox S. Hinds, being duly sworn according to law, upon his oath deposes and says:

1. I am one of the plaintiffs in this matter and I make this affidavit in support of a motion to amend the judgment.

2. One of the issues presented to the Court was the plaintiffs' contention that the proceedings herein were brought in bad faith. In an effort to develop that point, we sought to take the deposition of David M. Foley, Esq., member of the Middlesex County Ethics Committee in charge of the Lennox Hinds matter, in an effort to show the bad faith of that Committee in undertaking these charges against me. Annexed hereto and made a part hereof is a copy of the deposition, which shows an absolute refusal by Mr. Foley to answer any questions on this matter. We had thought that this alone would disable the defendant from claiming abstention, but evidently the Court did not agree with our view.

3. I wish to call the Court's attention to a further dimension of my claim of bad faith prosecution, namely, that, on information and belief, it was instigated by the Prosecutor of Middlesex County as part of a continued program of harassment of me because of my activities in the Assata Shakur (Joan Chesimard) case, as a rep-

resentative of the National Conference of Black Lawyers (hereinafter referred to as "the NCBL"). I believe that in the light of the representations made in this affidavit the Court should at least grant an evidentiary hearing on this issue.

4. The Court will note that during the interrogation of Mr. Foley it was made clear that my counsel was seeking information as to communications between the Middlesex County Prosecutor and the Middlesex County Ethics Committee (see page 8 of the deposition). The background for this appears below:

5. As the Court knows, I am the National Director of the NCBL, a not-for-profit corporation incorporated and duly registered in the District of Columbia. As chief executive officer of the NCBL, my responsibilities include the duty to develop opportunities to educate people in the various States on specific criminal trials and other legal issues which reflect racism in the administration of the criminal justice system and to assist in raising money to support the NCBL litigation program and those clients who have been selected by the NCBL Board of Directors as requiring unique efforts in their defense. I have engaged in such activities throughout the United States.

6. Assata Shakur (Joan Chesimard) is one defendant on whose behalf, as National Director of the NCBL, I personally assisted in educational and fund raising efforts.

7. On or about 7 P.M. on August 11, 1976, the NCBL sponsored a well-attended reception in support of Ms.

Shakur at the Rutgers Alumni/Faculty Club in New Brunswick, at which Angela Davis was guest of honor and I was the host.

8. At or about 6 P.M., when I arrived at the parking lot of the Club, I observed a man who I subsequently learned was a plain clothes officer working for and under the supervision of the Middlesex County Prosecutor. This man was writing down the license plate numbers of the vehicles used by persons attending the reception. On information and belief, he continued this activity throughout the evening under discussion.

9. After the reception was over, I invited Ms. Davis and a few others to join me at my home in Somerset, N. J. Ms. Davis left in one vehicle with some companions and a second carload of friends followed her, moving in the direction of my home. I followed in a third car with Victor Goode, Associate Director of the NCBL, and Lewis Myers, Jr., one of Ms. Shakur's defense attorneys during the pretrial period of *State* v. *Chesimard*. Approximately three blocks from the Club, on George Street between Landing Lane and the College, Ms. Davis's car and the car immediately behind her were stopped by detectives who subsequently identified themselves to me as "Prosecutor's men" and New Brunswick police officers.

10. The vehicle in which Mr. Goode, Mr. Myers, and I were riding pulled up behind the stopped cars. We got out of our car, identified ourselves to the law enforcement officers as lawyers, and indicated that we would be representing Ms. Davis and her companions. As we were speaking, a uniformed police officer took a shotgun out of his car, rested the gun on the hood, and pointed

it at Attorneys Goode, Myers, and me. We asked them for identification, which they produced, and this identification indicated that some of them worked for the Prosetor's Office and others were officers of the New Brunswick Police Department.

11. I asked them the purpose of their stopping the vehicles. The detectives said "it was a routine traffic check" and demanded that Ms. Davis and her companions get out of their cars, which they refused to do, saying that they feared for their lives. After some discussion we were finally permitted to continue on our way to my home.

12. While Ms. Davis and the other guests were at my house I observed Somerset County police cars patrolling continuously before my home. During that same evening, while Ms. Davis was with me at my home, reporters from at least one newspaper called me and asked why there was "an all-points bulletin for the arrest of Miss Angela Davis out on the police wire." Subsequently, Ms. Davis and her companions left my home. She later advised me that she was followed by police cars all the way back to the Holland Tunnel.

13. On or about two weeks before this reception date of August 11, 1976, Attorneys Lewis Myers and Stuart Ball, who were two of Ms. Shakur's defense attorneys in *State* v. *Chesimard,* presented a motion to Superior Court Judge Cohen to permit Angela Davis's visitation of Ms. Shakur, who was at that time a pretrial detainee in the Middlesex County Jail. Mr. Barrone, Middlesex County Prosecutor, arguing in opposition to this motion, presented the Court with a copy of an invitation to the reception and argued

that it was being given to develop public opinion adverse to the State's case and that Ms. Davis's presence was a publicity stunt to try the case in the press. He indicated the strenuous opposition of the Prosecutor's Office to the event.

14. On information and belief, thereafter a person or persons unknown, acting under the authority of Mr. Barone and the Prosecutor's Office, sent the Internal Revenue Service a copy of the reception invitation. On or about September 18, 1976, the NCBL received a letter from E. D. Alexander, Chief, Employee Plans, Exempt Organization Division, I.R.S., by M. Mussman, enclosing a copy of the aforesaid invitation and indicating in the letter that "it was brought to our attention that the NCBL is soliciting money for purposes of Joan Chesimard's defense" and requesting a whole series of justifications and information to justify this solicitation. It took a number of months and considerable work by NCBL co-general counsel Catherine Mitchell and Gay McDougall, and negotiations both in New York and Washington, D.C., before the I.R.S. appeared to be satisfied with our entitlement to collect those funds.

15. The day after I participated in the press conference which is the subject matter of the charges against me, it was Mr. Barone who brought the matter to the attention of the Court and he asked the Court "to take whatever action to stop this speaking." Referring to me, Mr. Barone said, "I ask the Court to take whatever steps he deems appropriate to this action." The Court's response was: "I'm going to check out the remarks of Mr. Hinds, and if I feel that they are as sufficiently insulting to the court system of New Jersey, I may take some action. I'll look into that."

16. The Court never took action against me but the Middlesex County Ethics Committee did. On information and belief, it did so in response in part to pressures from Mr. Barone, whose agents had, as pointed out above, continually been harassing me.

LENNOX S. HINDS

[JURAT OMITTED IN PRINTING]

Plaintiffs' Exhibit 1

Received into Evidence December 8, 1978

MIDDLESEX COUNTY
ETHICS COMMITTEE

Appointed by the
Supreme Court of New Jersey

Matthias D. Dileo, Sec.
252 Madison Ave.
Perth Amboy, N. J. 08862

Samuel C. Inglese, Chairman
Ronald J. Busch
John J. Hoagland
Francis J. Lutz
William C. Moran, Jr.
David Pavlovsky
Gail W. Chester
Michael A. Cohan
David M. Foley
Douglas T. Hague

January 28, 1977

PERSONAL AND CONFIDENTIAL

Matthias D. Dileo, Secretary
Middlesex County Ethics Committee
252 Madison Avenue
Perth Amboy, NJ 08862

Re: In the Matter of Lennox Hinds

Dear Mr. Dileo:

Enclosed herewith are copies of newspaper articles of the Daily News and the Newark Star Ledger which con-

tain quoted comments of attorney Lennox Hinds. The comments are clearly in violation of our Disciplinary Rules and Code of Ethics. This type of unethical conduct was the subject matter of the opinion of the Supreme Court in *In Re Mezzacca* 67 *NJ* 387 (1975).

I believe that Mr. Hinds has an office in New Brunswick and that this matter comes within the jurisdiction of the Middlesex County Ethics Committee.

I would greatly appreciate your circulating copies of these articles among members of the Ethics Committee and your scheduling a discussion on the matter at the next agenda session.

In the event that the Committee concludes that the conduct should be investigated, I would request that the matter be assigned to me.

Very truly yours,

DAVID M. FOLEY

DMF:ad
encls.

Plaintiffs' Exhibit 2

Received into evidence December 8, 1978.
Excerpt from newspaper article appearing in New Jersey edition of New York *Daily News*, January 21, 1977:

"Joanne Loses 2 Rounds in Trial Transfer"
By Daniel Hays and Joy McIntyre

* * *

Before the action in federal court began, Lennox Hinds, an attorney also representing Mrs. Chesimard, said the defense team wanted the case moved to another court because in New Brunswick "what we are seeing is legalized lynching."

He said he was speaking for the defense team because its members were "gagged" by Judge Appleby whom he accused of asking prospective jurors self-serving questions which he said were leading to "the creation of a hangman's court."

[PICTURE OMITTED IN PRINTING]

Caption accompanying omitted picture:

"Lennox Hinds, one of Joanne Chesimard's lawyers, ponders answer at a news conference in New Brunswick yesterday. Behind him is chief defense attorney William Kunstler."

Plaintiffs' Exhibit 3

Received into evidence December 8, 1978

Newspaper article in the Newark *Star Ledger,* January 21, 1977.

"U.S. Judge declines to stop Chesimard trial but orders hearing."

By Lawrence Nagy

"A federal appeals court judge yesterday refused to halt the murder trial of Joanne Chesimard, but said a three-judge 'emergency panel' will convene to rule on her request to remove the case from the state courts.

"The decision by Third U.S. Circuit Court of Appeals Judge Leonard I. Garth in Newark followed a flurry of legal activity by attorneys for the 29-year-old black activist whose trial for the 1973 murder of a state trooper began Monday in New Brunswick.

"Jury selection was halted yesterday when principals in the case received notice of a petition filed by Chesimard's attorneys late Wednesday with U.S. District Court Judge George Barlow in Trenton.

"The petition invoked a seldom-used federal law and asked the case be removed from state courts because the actions of the trial judge, methods of jury selection, pretrial publicity and the conditions of Chesimard's confinement violated her constitutional rights and made it impossible for her to receive a fair trial.

Plaintiffs' Exhibit 3

"Barlow rejected the petition and sent the case back to state court, citing a 1966 U.S. Supreme Court decision that 'the civil rights removal statute does not permit the judges of the federal courts to put their brethren of the state judiciary on trial.'

"At a press conference in New Brunswick before word of Barlow's decision was received, Lennox Hinds, executive director of the National Conference of Black Lawyers, called the state proceeding 'a travesty.'

"Hinds charged that Superior Court Judge Theodore Appleby 'does not have the judicial temperament or the racial sensitivity to sit as an impartial judge' in Chesimard's trial.

"Hinds said, 'It was only after the trial began that we began to have fears that what we are seeing is a legalized lynching.'

"Hinds has represented Chesimard in a separate federal civil suit challenging the conditions of her isolation cell confinement in the Middlesex County Jail but is not a member of the five-lawyer defense team, headed by William Kunstler.

"Garth refused a request from Chesimard's attorneys that the trial be halted today because of the woman's observance of Friday as the Muslim sabbath.

"Unless there is a voluntary moratorium, jury selection may proceed," Garth ruled.

Plaintiffs' Exhibit 3

"Garth said a three-judge panel of the Third U.S. Circuit of Appeals will meet Tuesday to consider the Constitutional issues raised in Chesimard's petition.

"The petition contends the Friday court sessions, the sequestering of the jury and Chesimard's confinement in the county jail violate her equal protection, due process and religious rights.

"In rejecting Chesimard's petition, Barlow ruled that sufficient legal ground for removal of the case to federal court was not established.

"Barlow noted the U.S. Supreme Court ruled that 'vindication of a defendant's rights is left to the state courts, except in rare situations in which it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.'

"Barlow concluded, 'It does not appear from the petition that this case amounts to one of those 'rare situations.'

"The petition to Barlow included a request for an order to Middlesex County Sheriff Joseph DeMarino to release Chesimard from state custody. Barlow denied the request.

"It was not immediately clear whether Judge Appleby would resume jury selection in the long-de-

layed trial today or suspend the proceedings pending a ruling from the federal three-judge panel.

"By the end of the proceedings on Wednesday, Appleby had completed the initial questioning of the first panel of 61 potential jurors, excusing 37 and retaining 24."

Plaintiffs' Exhibit 4

Received into Evidence December 8, 1978

MIDDLESEX COUNTY
ETHICS COMMITTEE
Appointed by the
Supreme Court of New Jersey

Matthias D. Dileo, Sec.
252 Madison Ave.
Perth Amboy, N. J. 08862

PLEASE REPLY TO:

P.O. Box 1963
850 Georges Road
North Brunswick, NJ

William C. Munan, Jr., Chairman
Douglas T. Hague
Francis J. Lutz
David Pavlovsky
Gail W. Chester
Michael A. Cohan
David M. Foley
Ronald J. Busch
Robert C. Rafano
Frank J. Rubin

February 24, 1977

PERSONAL AND CONFIDENTIAL
Lennox Hinds, Esq.
94 Bayard Street
New Brunswick, NJ 08901

Plaintiffs' Exhibit 4

Dear Mr. Hinds:

As a member of the Middlesex County Ethics Committee I have been designated to conduct an investigation to determine whether you violated the Disciplinary Rules of the Code of Responsibility in your comments to the news media in January of 1977.

I am advised that you convened a press conference shortly prior to January 20, 1977 at which time you termed the Chesimard trial before Judge Theodore Appleby, "a travesty".

Further, it is alleged that you charged that Judge Appleby "does not have the judicial temperament or the racial sensitivity to sit as an impartial judge" in that trial.

It is also alleged that you termed the trial before Judge Appleby, "a legalized lynching" and that Judge Appleby in questioning prospective jurors was creating "a hangman's court".

I am in possession of newspaper articles that appeared in the Newark Star Ledger and the Daily News on or about January 21, 1977.

I would greatly appreciate your contacting me at your earliest opportunity in order that we may make arrangements for a conference. Naturally, if you so choose, you have the right to be represented by counsel at the conference.

Thank you for your cooperation.

Very truly yours,

DAVID M. FOLEY

DMF:ad

Plaintiffs' Exhibit 5

Received into Evidence December 8, 1978

MIDDLESEX COUNTY ETHICS COMMITTEE

IN THE MATTER OF THE ALLEGED UNETHICAL CONDUCT OF LENNOX HINDS, ESQ., An attorney at Law of New Jersey.

REPORT TO THE COMMITTEE

On or about January 20, 1977, Lennox Hinds spoke at a press conference in New Brunswick, New Jersey, concerning the Joanne Chesimard criminal trial litigation. Mr. Hinds' comments at that conference are the subject of this report. Present at the conference, were Lawrence Nagy of the Newark Star Ledger and Daniel Hays and Joy McIntrye of the New York Daily News. Mr. Hinds represented himself to be a member of, and speaking for, the Joanne Chesimard defense team. The jury selection process in the Joanne Chesimard trial had commenced on January 17, 1977 in Middlesex County. It was concluded on February 15, 1977. Ms. Chesimard was represented in the criminal trial before the Honorable Theodore Appleby by a team of lawyers headed by attorney William Kunstler. Mr. Hinds was not one of the attorneys who represented Ms. Chesimard in that trial. Following the commencement of the jury selection process, Ms. Chesimard's attorneys filed a petition in the Federal District Court,

Plaintiffs' Exhibit 5

Trenton, New Jersey, seeking to have the case removed from the state court to the federal court. This petition was denied by the federal court. Shortly subsequent to the denial of the aforesaid petition the Hinds press conference was held in New Brunswick.

It was reported in the January 21, 1977 edition of the Newark Star Ledger by reporter Lawrence Nagy that Lennox Hinds called the trial before Judge Appleby, "a travesty". Mr. Hinds charged that Judge Appleby "does not have the judicial temperament or the racial sensitivity to sit as an impartial judge" in the Chesimard trial. He stated further that "it was only after the trial began that we began to have fears that what we are seeing is a legalized lynching."

It was reported in the January 21, 1977 edition of the New York Daily News by reporters Daniel Hays and Joy McIntrye that Lennox Hinds stated that the defense team wanted the case moved to another court because in the state court "what we are seeing is legalized lynching." Mr. Hinds stated that he was speaking for the defense team because its members were "gagged" by Judge Theodore Appleby. Mr. Hinds also stated that Judge Appleby was asking prospective jurors self-serving questions which the said were leading to "the creation of a hangman's court".

Although Mr. Hinds did not appear as attorney in either the criminal trial before Judge Appleby or on the petition to have the case removed from the state court to the federal court, Mr. Hinds represented himself to be a member of the defense team and stated that he was speaking on behalf of the defense team because it was "gagged". Mr. Hinds had represented Ms. Chesimard in prior civil

litigation which pertained to her confinement in the Middlesex County Jail.

As part of my investigation, I interviewed by telephone Lawrence Nagy of the Newark Star Ledger and Daniel Hays of the New York Daily News. I did not interview Joy McIntyre although I would intend to produce her as a witness in the event that the committee determines to have a hearing in this matter. Both Mr. Nagy and Mr. Hays informed me that the quotes attributed to Mr. Hinds in their respective articles were accurate and that they would stand behind their articles.

I also contacted Mr. Paul Springle a reporter with the State of New Jersey, Public Broadcasting Authority (Channel 52) concerning the Hinds press conference. Mr. Springle referred my correspondence to Mr. George Perkins, Director of News and Public Affairs of the Public Broadcasting Authority. Mr. Perkins informed me by letter that the Public Broadcasting Authority covered a news conference concerning the Chesimard trial on January 20, 1977 and he furnished me with a tape recording of that conference which contained the following comments by Mr. Hinds:

> Mr. Hinds: "We feel that it is a kangeroo—it will be a kangeroo court unless the judge recluses himself and that will be at the very minimum."
> Reporter: "And a kangeroo court means a guilty verdict."
> Mr. Hinds: "That's correct."

I attempted to interview Lennox Hinds without success. I corresponded with Mr. Hinds informing him of the investigation and requesting his cooperation with me in connection with the investigation. I had contact by telephone

and by letter with attorneys Morton Stavis of Newark, New Jersey, Bernard K. Freaman of Newark, New Jersey, and Catherine P. Mitchell, Esq. of Paterson, New Jersey, all of whom represent Mr. Hinds. Without being specific, I informed Mr. Hinds' attorneys that I would like to interview him concerning the news articles, the quotes therein attributed to him and Mr. Hinds' relationship to, and connection with, the Chesimard defense team. As previously stated, my efforts to interview Mr. Hinds were in vain.

Mr. Hinds' conduct and public statements are violative of DR 1-102(A)(5) and DR 7-107(D) which are set forth as follows:

> DR 1-102. Misconduct
>
> (A) A Lawyer shall not:
>
> • • •
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> DR 7-107. Trial Publicity
>
> • • •
>
> (D) During the selection of a jury or a trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making any extra-judicial statement that he expects to be disseminated by means of public communication and that relates to the trial, • • • or other matters that are reasonably likely to interfere with a fair trial, • • •.

Plaintiffs' Exhibit 5

The public statements made by Mr. Hinds are clearly prejudicial to the administration of justice in violation of DR 1-102. These statements were made during the jury selection process in the Chesimard case and Mr. Hinds represented himself to be a member of, and a spokesman for, the Chesimard defense team. Clearly these extrajudicial statements related to the trial and were also reasonably likely to interfere with a fair trial in that the statements were designed to influence the thinking of prospective jurors. The statements were made at a press conference for the sole purpose of having them disseminated by means of public communication. These statements violate DR 7-107(D).

It is my recommendation that a statement of charges be prepared and served upon Mr. Hinds.

Respectfully submitted,

DAVID M. FOLEY

Dated: December 22, 1977

Plaintiffs' Exhibit 6

Received into evidence December 8, 1978

Memorandum to File prepared by David M. Foley, Esq.

MEMORANDUM

Re: In the Matter of Lennox Hinds, Esq.

Matt Dileo will send the ethics opinions over to Doug Hague's office and we should pick them up.

This matter should again be reviewed by the committee before we determine whether or not to file a statement of charges and have a hearing. There does not appear to be any specific violation of DR7-106 and DR7-107. Nor does there appear to be a violation of DR8-102 which deals with statements concerning judges. With regard to DR8-102B, the rules states that "a lawyer shall not knowingly make a false accusation against a judge." If we proceed under this rule it would draw directly into question the truth or falsity of the statements made by Lennox Hinds which would, in essence, require us to determine the qualifications of Judge Appleby. This obviously we do not wish to do.

DR7-107D speaks about lawyers making extra judicial statements about "other matters that are reasonably likely to interfere with a fair trial." Also, DR1-102A5 states that, "lawyers shall not engage in conduct that is prejudicial to the administration of justice." These last two DRs are very general in scope and I do not believe they are intended to cover the conduct that is here in question.

When the Ethics Committee recommended that a statement of charges be filed and a hearing held, it was with the understanding that the conduct of Lennox Hinds in

making comment to the press was a violation of a specific DR. Since such is not the case the committee, should have an opportunity to re-evaluate its position before recommending that a statement of charges be filed.

In the interim, we will research this matter by reviewing the ethics opinions.

Ed Barone's office has informed us that the jury selection began on January 17, 1977 and ended on February 15, 1977 in the Chesimard trial.

Plaintiffs' Exhibit 7

Received into Evidence December 8, 1978

MEMO TO FILE

July 23, 1977

RE: ETHICS

On Tuesday, July 19, 1977, I spoke with Bob Cowen concerning the *Lennox Hinds* case and advised him what we were doing. He indicated that our actions were appropriate but that after we had filed a Statement of Charges, we should gi e Hinds another opportunity to voluntarily set forth his position after he has filed his answer. If he refuses, fine. Bob indicates that an attorney may elect to take the Fifth Amendment and if so, there's nothing you can do about it. He may even refuse to file an answer in the event the Fifth is invoked. I thought that a lawyer could not do this, but Bob indicates that he certainly may and that there's a recent Supreme Court decision on the subject.

I also discussed with with him the substantive merits of the case. Bob believes that if he's not a member of the defense team and he does not think that he was because the civil action before Judge Barlow was a completely independent action, he still would be subject to violation of the DR's by making public statements which would be disruptive of the trial. I indicated that I would advise the Committee of this at our next meeting.

M. D. DILEO, Secretary

Plaintiffs' Exhibit 8

Received into Evidence December 8, 1978

Cranbury-South River Road
Cranbury, New Jersey 08512
(609) 655-3600

July 1, 1977

Morton Stavis, Esq.
744 Broad Street
Newark, New Jersey 07102
Re: Lenox S. Hinds, Esq.

Dear Mr. Stavis:

Your letter of June 21, 1977, addressed to David M. Foley, Esq., has been reviewed by the entire Middlesex County Ethics Committee and I am writing as Chairman on behalf of the entire Committee.

You are correct in your conclusion that at this time the Committee is proceeding under Rule 1:20-2(b). At this stage the Committee is operating strictly in preliminary investigatory phase, the procedures for which are set forth in R. 1:20-4(c). This section provides that the Committee member, or members, assigned to the investigation shall interview the Complainant and the Attorney and conduct the investigation in such other manner as it deems appropriate.

Mr. Foley has requested a conference with Mr. Hinds in order to carry out the interview with the Attorney, which is required by the Rules.

It is the procedure of the Committee to make a preliminary investigation of all matters coming before it to determine whether or not the matter should be dismissed on its

face as not involving any unethical behavior—or whether the complaint is of such a nature that a formal hearing should be held by the Committee. At this point our request for the cooperation of Mr. Hinds assumes his voluntary compliance.

In the event Mr. Hinds does not wish to voluntarily cooperate with the Committee in this investigation, then the Committee will have to determine whether or not the matter warrants the holding of a formal hearing, based only on the other material that is available to it and without Mr. Hinds input.

In the event a determination is made that a formal hearing should be held, then Mr. Hinds would be notified of the time and place for the hearing and given the opportunity to subpoena any witnesses he wishes, since the Committee does have subpoena power pursuant to R. 1:20-6.

I believe it is clear that Mr. Foley's investigation, including his interview with Mr. Hinds, relates to the subject matter contained in his letter of February 24, and it is these matters which would be discussed at the interview.

If Mr. Hinds elects not to cooperate with the Committee and confer with Mr. Foley concerning these matters, it would be appreciated if you would let us know at once so prompt determination of procedure can be made by the Committee, as required by the Rules.

With thanks for your anticipated cooperation, I am

Very truly yours,

William C. Moran, Jr.

WCM/ko's

cc: Matthias D. Dileo, Secretary
Middlesex County Ethics Committee
David M. Foley, Esq.

Plaintiffs' Exhibit 9

Received into Evidence December 8, 1978

Excerpts from Minutes of Meetings of the Middlesex County Ethics Committee

March, 1977

The regular monthly agenda meeting of the Middlesex County Ethics Committee was held on Friday, March 11, 1977 at the Middlesex County Court House.

Present were: William Moran, Ronald Busch, Robert Rafano, Douglas Hague, Michael Coban, Gail Chester, David Pavlovsky, David Foley, Frank Rubin and Matthias Dileo.

* * *

MATTERS UNDER INVESTIGATION

42. *In the Matter of Lennox Hinds*

Mr. Foley had been directed by the Committee to investigate statements made by respondent at a press conference involving the matter of *State* v. *Chesimard,* which is presently being tried in Middlesex County. The statements appear to be violative of certain Disciplinary Rules. Mr. Foley wrote a letter to respondent advising him of the investigation and requesting a conference. Respondent replied that Mr. Foley would be contacted by his counsel. Thereafter Mr. Foley's letter was publicized and, in fact, reference made thereto at the trial. In view of the fact that the continuation of this investigation may generate additional publicity which may have an effect on the

pending trial, the Committee decided to hold the matter in abeyance pending the completion of the trial.

April, 1977

The regular monthly agenda meeting of the Middlesex County Ethics Committee was held on Friday, April 15, 1977 at the Middlesex County Court House.

Present were: William Moran, Robert Rafano, Douglas Hague, Frank Rubin, Gail Chester, David Pavlovsky, Ronald Busch and Matthias Dileo.

• • •

MATTERS UNDER INVESTIGATION

12. *In the Matter of Lennox Hinds*

The Committee had decided to hold the investigation in this matter in abeyance pending the completion of the Chesimard trial. Although the trial was completed several weeks ago, by letter dated March 11, 1977, the National Conference of Black Lawyers corresponded with Mr. Foley requesting that the matter be held in abeyance for a period of sixty days so that that organization would have an opportunity to discuss the implications of the matter and arrange for counsel for the respondent. By letter dated March 18, 1977, Mr. Foley acceded to this request. The Committee approved this action.

Plaintiffs' Exhibit 9

May, 1977

The monthly agenda meeting of the Middlesex County Ethics Committee was held on Thursday, May 26, 1977 at the Middlesex County Court House.

Present were: William Moran, Gail Chester, David Foley, Francis Lutz, Michael Cohan, Douglas Hague and Matthias Dileo.

• • •

MATTERS UNDER INVESTIGATION

9. *In the Matter of Lennox Hinds*

Pursuant to request of the National Conference of Black Lawyers, Mr. Foley agreed to hold the matter in abeyance for a period of sixty days so that that organization would have the opportunity to discuss the implications of the matter and arrange for counsel for the respondent. Mr. Foley was recently advised that Catherine Mitchell, Esq. would be representing the respondent and he has commenced his investigation.

June, 1977

The monthly agenda meeting of the Middlesex County Ethics Committee was held on Friday, June 24, 1977 at the Middlesex County Court House.

Present were: William Moran, Ronald Busch, Michael Cohan, Frank Rubin, Gail Chester, David Pavlovsky, Robert Rafano, Douglas Hague and Matthias Dileo.

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Plaintiffs' Exhibit 9

MATTERS UNDER INVESTIGATION

6. *In the Matter of Lennox Hinds*

Mr. Foley, who was not present at the meeting, advised the Chairman and the Secretary that he had corresponded with the attorneys for the respondent requesting that a conference be held. He received a response requesting advices as to whether respondent was being compelled to attend or whether he was to appear voluntarily and, in addition, the purpose of the conference. It was determined that the Chairman should respond to the letter by indicating that the appearance was a voluntary one and that if respondent elected not to appear, the Committee would make its determination as to whether the filing of a Statement of Charges was in order without the benefit of respondent's version of the situation.

July, 1977

The monthly agenda meeting of the Middlesex County Ethics Committee was held on Friday, July 22, 1977 at the Middlesex County Court House.

Present were: Michael Cohan, David Pavlovsky, Ronald Busch, Gail Chester, Douglas Hague, Frank Rubin and Matthias D. Dileo.

* * *

MATTERS UNDER INVESTIGATION

4. *In the Matter of Lennox Hinds*

In accordance with the determination made by the Committee at the last meeting, Mr. Moran directed a

letter to the attorney for Mr. Hinds advising that his requested appearance before Mr. Foley was a voluntary one. In response to this letter, Mr. Moran received correspondence from the attorneys for Mr. Hinds advising that Mr. Hinds would not appear unless and until he had meaningful information. The attorney indicated that either he and/or other attorneys representing Mr. Hinds would meet with Mr. Foley to ascertain the purpose of Mr. Hinds' requested appearance. The Chairman responded on July 15, 1977 to the effect that since it is obvious that Mr. Hinds does not intend to voluntarily cooperate with the Committee, the matter will proceed without his cooperation. Mr. Foley is to continue his investigation to determine whether a Statement of Charges is in order.

September, 1977

The monthly agenda meeting of the Middlesex County Ethics Committee was held on Friday, September 16, 1977 at the Middlesex County Court House.

Present were: William Moran, Michael Cohan, Francis Lutz, Ronald Busch, David Foley, Douglas Hague, Gail Chester, David Pavlovsky and Matthias D. Dileo.

* * *

MATTERS UNDER INVESTIGATION

4. *In the Matter of Lennox Hinds*

As indicated in the last Report, since it was apparent that Mr. Hinds did not intend to voluntarily cooperate with the Committee, the matter would proceed

Plaintiffs' Exhibit 9

without his cooperation. Subsequently, an attorney, one Mr. Freamon, contacted Mr. Foley and after discussion advised that he would let him know whether Mr. Hinds would attend the requested conference. Mr. Foley heard nothing further and continued his investigation which he completed. He gave an oral report recommending that a Statement of Charges be prepared and served upon the respondent. Upon receipt of his answer, if it appeared that no further investigation was required, the matter would be scheduled for hearing. Upon receipt of his written report and Statement of Charges, the Secretary was directed to file same and serve the Statement of Charges upon respondent.

October, 1977

The monthly agenda meeting of the Middlesex County Ethics Committee was held on Friday, October 21, 1977 at the Middlesex County Court House.

Present were: William Moran, Michael Cohan, Frank Rubin, Ronald Busch, David Foley, Gail Chester, David Pavlovsky, Douglas Hague and Matthias Dileo.

* * *

MATTERS UNDER INVESTIGATION

3. *In the Matter of Lennox Hinds*

Carried one month awaiting written report and Statement of Charges being prepared by Mr. Foley.

Plaintiffs' Exhibit 9

November, 1977

The monthly agenda meeting of the Middlesex County Ethics Committee was held on Tuesday, November 22, 1977 at the Middlesex County Court House.

Present were: William Moran, Douglas Hague, David Foley, David Pavlovsky, Robert Rafano, Frank Rubin, Ronald Busch, Gail Chester and Matthias Dileo.

* * *

MATTERS UNDER INVESTIGATION

1. *In the Matter of Lennox Hinds*

   Mr. Foley submitted his report together with a Statement of Charges, which report recommended that the Statement of Charges be filed and served upon Mr. Hinds. The Committee accepted this report and directed the Secretary to process the Statement of Charges.

December, 1977

The monthly agenda meeting of the Middlesex County Ethics Committee was held on Friday, December 16, 1977 at the Middlesex County Court House.

Present were: William Moran, Francis Lutz, David Pavlovsky, Gail Chester, Frank Rubin, Ronald Busch, David Foley, Robert Rafano, Douglas Hague and Matthias D. Dileo.

* * *

Plaintiffs' Exhibit 9

MATTERS UNDER INVESTIGATION

1. *In the Matter of Lennox Hinds*

The Secretary is in the process of filing the Report of the Committee and Statement of Charges prepared Mr. Foley, and serving a copy of the Statement of Charges upon respondent.

January, 1978

The monthly agenda meeting of the Middlesex County Ethics Committee was held on Friday, January 27, 1978 at the Middlesex County Court House.

Present were: Michael Cohan, Martin Koch, Frank Rubin, Ronald Busch, Gail Chester, Michael Oropollo and Matthias Dileo.

* * *

MATTERS UNDER INVESTIGATION

1. *In the Matter of Lennox Hinds*

The Secretary filed the Report of the Committee and the Statement of Charges and served a copy of the latter upon the respondent on January 3, 1978. The Secretary received a telephone call from the attorney for the respondent requesting a 30-day extension of time within which to answer the Statement of Charges. The Committee agreed to the request and the Secretary was advised to notify the attorney.

Plaintiffs' Exhibit 9

February, 1978

The monthly agenda meeting of the Middlesex County Ethics Committee was held on Friday, February 24, 1978, at the Middlesex County Court House.

Present were: Michael Cohan, David Foley, Robert Rafano, William Moran, Martin Koch, Ronald Busch and Gail Chester.

Present for matter No. 30 only--David Pavlovsky.

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MATTERS UNDER INVESTIGATION

1. *In the Matter of Lennox Hinds*

The Secretary filed the Report of the Committee and the Statement of Charges and served a copy of the latter upon the respondent on January 3, 1978. The Secretary received a telephone call from the attorney for the respondent requesting a 30-day extension of time within which to answer the Statement of Charges. The Committee agreed to the request and the Secretary was advised to notify the attorney. The Secretary was notified of a complaint to be filed in the Federal Court by Mr. Hinds' attorney. They were also to seek a Restraining Order. Pursuant to the Secretary's conversation with Mr. Cowen, respondent was given an extension to March 10, 1978, to file an answer to the Ethics complaint. The Federal Court complaint against the Ethics Committee is to be handled by the Attorney General's Office through Mr. Cowen. Service of Summons and Complaint was made on the Ethics Committee.

Plaintiffs' Exhibit 9

March, 1978

The monthly agenda meeting of the Middlesex County Ethics Committee was held on Friday, March 17, 1978, at the Middlesex County Court House.

Present were: Michael Cohan, Martin Koch, William Moran, Gail Chester, David Foley and Douglas Hague.

* * *

MATTERS UNDER INVESTIGATION

1. *In the Matter of Lennox Hinds*

The Secretary filed the Report of the Committee and the Statement of Charges and served a copy of the latter upon the respondent on January 3, 1978. The Secretary received a telephone call from the attorney for the respondent requesting a 30-day extension of time within which to answer the Statement of Charges. The Committee agreed to the request and the Secretary was advised to notify the attorney. The Secretary was notified of a complaint to be filed in the Federal Court by Mr. Hinds' attorney. They were also to seek a Restraining Order. Pursuant to the Secretary's conversation with Mr. Cowen, respondent was given an extension to March 10, 1978, to file an answer to the Ethics complaint. The Federal Court complaint against the Ethics Committee is to be handled by the Attorney General's Office through Mr. Cowen. Service of Summons and Complaint was made on the Ethics Committee. Summons and Complaint forwarded to the Attorney General's Office for appropriate answer and handling. An Order to Show Cause

was also served upon the Ethics Committee and was forwarded to the Attorney General's Office for handling. The matter is being handled by Deputy Attorney General Stacy L. Moore, Jr. The matter is being held in abeyance until the Federal Court hearing, concerning the Order to Show Cause, is heard.

April, 1978

PRESENT WERE:

Michael Cohan

Ronald Busch

Frank Rubin

Gail Chester

Gilbert Nelson

Martin Koch

David Foley

Robert Rafano (present for his cases only)

* * *

MATTERS UNDER INVESTIGATION

1) *In the Matter of Lennox Hinds*

(DF) The Order to Show Cause is presently scheduled for May 1, 1978. The matter is being held in abeyance pending the outcome of the Federal Court hearing.

Plaintiffs' Exhibit 9

May, 1978

PRESENT WERE:

Michael Cohan

Ronald Busch

Gail Chester

Martin Koch

Michael Oropollo

• • •

MATTERS UNDER INVESTIGATION

1) *In the Matter of Lennox Hinds*

(DF) The Order to Show Cause was scheduled for May 1, 1978. The matter is being held in abeyance pending the outcome of the Federal Court hearing.

June, 1978

PRESENT WERE:

1) Michael A. Cohan
2) Frank J. Rubin
3) Gail W. Chester
4) Ronald J. Busch
5) Martin S. Koch
6) Gilbert L. Nelson
7) David M. Foley
8) Michael B. Oropollo

• • •

Plaintiffs' Exhibit 9

MATTERS UNDER INVESTIGATION

1) *In the Matter of Lennox Hinds*

(DF) The Order to Show Cause was scheduled for May 1, 1978. The matter is being held in abeyance pending the outcome of the Federal Court hearing. Order to Show Cause was heard by the Federal Court and the Federal Court will not intervene. The Disciplinary Review Board will decide whether they will take over the investigation in the matter.

July, 1978

PRESENT WERE:

1) Michael Cohan, Chairman
2) Frank Rubin
3) Gail Chester
4) David Foley
5) Michael Oropollo, Secretary

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MATTERS UNDER INVESTIGATION

1. *In the Matter of Lennox Hinds*

(DF) The Disciplinary Review Board has not made a decision on taking over the matter.

Plaintiffs' Exhibit 9

September, 1978

PRESENT WERE:

1) Michael Cohan, Chairman
2) Gail Chester
3) Ronald Busch
4) Frank Rubin
5) David Foley
6) Michael Oropollo, Secretary

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MATTERS UNDER INVESTIGATION

1. *In the Matter of Lennox Hinds*

(DF) The Disciplinary Review Board has not made a decision on taking over the matter.

October, 1978

PRESENT WERE:

1. Michael A. Cohan, Chairman
2. Ronald J. Busch
3. Gail W. Chester
4. Martin S. Koch
5. Michael B. Oropollo, Secretary

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Plaintiffs' Exhibit 9

MATTERS UNDER INVESTIGATION

1. *In the Matter of Lennox Hinds*

(DF) The Disciplinary Review Board has not made a decision on taking over the matter.

Plaintiffs' Exhibit 10

Received into evidence December 8, 1978

MIDDLESEX COUNTY ETHICS COMMITTEE

Appointed by the Supreme Court of New Jersey

MICHAEL B. OROPOLLO, SEC.
96 Bayard Street
New Brunswick, N.J. 08903

Please reply to:

429 Washington Road
Sayreville, New Jersey 08872
Tel: (201) 254-7444

MICHAEL A. COHAN, CHAIRMAN
GAIL W. CHESTER
DAVID M. FOLEY
RONALD J. BUSCH
ROBERT C. RAFANO
FRANK J. RUBIN
DOUGLAS T. HAGUE
MARTIN S. KOCH
WILLIAM C. MORAN, JR.
GILBERT L. NELSON

March 28, 1978

Robert E. Cowen, Esq.
Assistant Director
Administrative Office of the Courts
State House Annex, CN-037
Trenton, New Jersey 08625

Re: In the Matter of Lennox Hinds

Plaintiffs' Exhibit 10

Dear Mr. Cowen:

I enclose herewith approximately 75 form letters sent by Rutgers' law students to David Foley, Esq., a member of the Middlesex County Ethics Committee. As you know, Mr. Foley is the attorney assigned to investigate the above matter.

Both Mr. Foley and I are greatly disturbed not only by the previous correspondence received by us, but more importantly about this attempt to intimidate and coerce the Committee into dropping the investigation through the use of Rutgers' law students who are obviously totally unaware of the factual circumstances of this investigation. The references to the disbarment of Mr. Hinds and to the dropping of charges show a complete lack of information on the part of those signing the letters. Mr. Foley and I both feel that this attempt to intimidate a member of the Committee may very well constitute a new charge against Mr. Hinds. His complaint is obviously with the system itself rather than our Committee, and accordingly, it is my feeling that the investigation should be continued by your office at this time. There is no way that any member of the Committee can spend the time necessary to investigate this matter at his own expense.

Please review the enclosed and let me hear from you as soon as possible.

Very truly yours,

Michael A. Cohan
Chairman
MAC/e

Plaintiffs' Exhibit 10

Enclosures

cc: Michael B. Oropollo, Esq.
Secretary, Middlesex County
Ethics Committee
David M. Foley, Esq.
Stacy L. Moore, Jr., Esq.

Plaintiffs' Exhibit 11

Deposition of Hon. Theodore Appleby taken October 30, 1978; Received Into Evidence October 2, 1979

[caption omitted in printing]

TRANSCRIPT of stenographic notes of the proceedings in the above entitled matter, as taken before Denise Kurdyla, a Notary Public and Certified Shorthand Reporter of New Jersey, at the offices of Messrs. Mandel, Wysoker, Sherman, Glassner & Weingartner, 71 Paterson Street, New Brunswick, New Jersey, on Monday, October 30, 1978, commencing at 10:15 A.M.

Appearances:

MORTON STAVIS, ESQ.
Attorney for Plaintiffs

BERNARD K. FREAMON, ESQ.
Rutgers Urban Legal Clinic
Attorney for Plaintiffs

ALFRED A. SLOCUM, ESQ.
Attorney for Lennox S. Hinds

STACY L. MOORE, JR., ESQ.
Deputy Attorney General
For the Middlesex County Ethics Committee

M. KATHLEEN DUNCAN, ESQ.
Deputy Attorney General
For the Honorable Theodore Appleby

DENISE KURDYLA
Certified Shorthand Reporter

Plaintiffs' Exhibit 11

(84)* THE HONORABLE THEODORE APPLEBY, being first duly sworn, testifies as follows:

Direct examination by Mr. Stavis:

Q. Judge, you have been served with a subpoena in this matter? A. That's correct—

Mr. Stavis: Would you mark this, please.

(Subpoena dated October 19, 1978 is received and marked P-11 for identification.)

Q. Judge, I show you P-11 for identification and you notice it is a Subpoena Duces Tecum and I ask you whether you brought any papers or not? A. I have brought no papers.

Q. Are there any papers which are described in that subpoena? A. No.

Q. Judge, you are a Judge of the Superior Court of New Jersey? A. Yes, sir.

(85) Q. This is in Middlesex County Law Division? A. Yes.

Q. And you sat on a case known as the Assata Shakur or the Joanne Chesimard case? A. Yes.

Q. That case was tried some time in 1977. Is that correct? A. Yes.

Q. Do you recall an occasion when there was a discussion in court with respect to certain alleged statements made by Mr. Lennox Hinds? A. Yes.

Q. Do you recall that Mr. Barone asked you to take certain action against Mr. Hinds? A. I don't really recall

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* Figures in parentheses refer to each new page of the stenographic transcript.

that, to tell the truth. I read it in the—in I assume the same paper you have there, it was shown to me by my Counsel this morning. It could very well have happened.

Ms. Duncan: The witness is referring to the affidavit that was attached to your Notice For Alteration or Amendment of the Judgment.

Q. Well, that's not what I was referring to. A. Oh.

Q. I well understand the confusion here.

Perhaps it will help if I show you a portion of (86) the transcript of the Chesimard case, that may refresh your recollection. A. I recall this very well (indicating).

Q. Now, you do recall Mr. Barone definitely did ask you to take certain action? A. If it says it there, he did, yes.

Q. Did you take any action? A. I did not.

Q. Did you have any communication with anybody in conection with Mr. Hinds' statement? A. I did not.

Q. Why not? A. I didn't think it was necessary.

Q. What made you think it was not necessary in the light of Mr. Barone— A. I was too busy with the trial.

Q. You didn't consider if it had any impact on the trial? A. Yes, I thought it had impact on the trial but this was only one in a series of things. What do you think, it bothered me a little bit.

Q. But I take it that that was transitory to you being a part of it? A. That's correct.

Q. Do you remember the name of the case which says (87) something like judges have hardy skins.

Now, you said this was one of a series of things that bothered you? A. Well—

Q. What were some of these other things? A. Aren't we getting diverted from the purpose of this?

Q. I want to know whether any of these things had anything to do with Lennox Hinds. A. No.

Plaintiffs' Exhibit 11

Q. I see, now you, yourself, knew that Lennox Hinds was not Counsel of record in this case? A. I certainly knew that.

Q. And not only was he not Counsel of record, he wasn't Counsel in any way, he never appeared on this matter, did he? A. That's correct. I had heard that he represented other facets of the Chesimard situation but that's all I knew.

Q. But not the criminal case before you? A. No.

Q. Now, at any time were you in communication with any representative of the Middlesex County Ethics Committee with respect to this matter? Now I emphasis the word "at any time" either with respect to the initiation of the complaint or any subsequent investigation. A. No.

(88)Q. Or any subsequent determination by the Middlesex County Ethics Committee as to what it should do about the matter? A. No.

Q. I want to make sure you understand my question refers to communication direct or indict. A. Never.

Q. Did anyone from the Middlesex Ethics Committee ever inquire of you whether Mr. Hinds functioned as Counsel on this matter? A. No.

Q. If he had you would have answered exactly as you did here? A. That's the truth.

Q. Did anybody inquire of you whether this had any impact on the trial?

Ms. Duncan: Whether what had any impact?

Mr. Stavis: Whether Mr. Hinds' comments had any impact on the trial.

A. Not that I recall.

Q. If they had, you would have answered exactly as you did? A. I don't think it had any impact on the trial whatsoever.

Plaintiffs' Exhibit 11

Mr. Stavis: Excuse me just a moment.
The Witness: Sure.

(89) Q. Now, I used the word "impact." You would answer the same question if I used the word "interfere"?

Mr. Moore: I think regardless of the Judge's opinion that's a matter for the Ethics Committee and the Supreme Court to decide. This is a gratuitous opinion.

Mr. Stavis: I understand the objection but now I've asked the witness a question.

Mr. Moore: I want my objection on the record.

Mr. Stavis: I'm pleased to have it on the record.

A. Does it interfere with the trial?

Q. Yes. A. I don't know if it interfered with the trial. It cost us a little time that morning.

Q. Excepting for it that neither interfered nor threatened to interfere with the trial?

Ms. Duncan: I believe the Judge answered the question.

A. You are trying to get an opinion that would be helpful.

Q. No, all I want from you, Judge, is not opinion, all I want is facts. A. The facts are it didn't bother me much, it did not interfere with the physical happening of the trial.

Q. Or anything else in connection? (90) A. Not that I know of.

Q. And nobody ever inquired of you? A. No.

Q. As to whether it did? A. No.

Q. You quoted in the newspaper article written by Reginald Kavanaugh of the Home News as follows, and I will

ask you whether that quotation is accurate: "When Kunstler demanded that Appleby take action halt the proceeding"—the reference is to the Ethics Committee hearings—"the Judge said he knew nothing until the Defense Counsel told him. But Appleby added: 'I think it's the greatest thing that ever happened.'" A. That's right, I said that.

Q. Aside from the hyperbole and possible exaggeration and suggesting that it's the greatest thing that happened — A. Was that hyperbole?

Q. —what prompted that comment? A. I didn't know.

Ms. Duncan: I object to the relevancy of that question. I think the testimony today should be directed toward whether there was any bad faith on the part of the Ethics Committee in instituting the proceedings and the Judge testified he had no contact with the Ethics Committee at all or (91) conversations with anybody relevant to the Ethics Committee proceedings so I would object to that question concerning the Judge's thought processes and advise him not to answer.

Mr. Stavis: You understand the Judge is a witness.

Ms. Duncan: Yes, of course I understand that.

Mr. Stavis: And the witness cannot assert an objection of relevancy, it's the party.

Ms. Duncan: But the depositions are to be conducted in asking questions concerning the subject matter which is relevant to the proceedings.

Mr. Stavis: I'm emphasizing the difference between a witness and a party and I ask the question be repeated and ask the Judge whether he will answer the question.

Plaintiffs' Exhibit 11

Ms. Duncan: I have advised the Judge not to answer. Of course, the Judge may do as he pleases.

The Witness: What's the question?

(The pending question is read by the reporter.)

A. I have been told by Counsel not to answer it.

Q. And you don't intend to? A. No.

Q. There is a further statement in that newspaper (92) article which I would like to read to you. "Appleby again insisted he had nothing to do with the Ethics Committee's action but would look into it. However, the Judge made no promises about taking any action himself."

Is that an accurate report of the conversation— A. It is and I did not look into it.

Q. You did not look into it? A. Absolutely.

Q. And did anybody look into it with you? A. No.

Q. Did you individually or through any other party make any effort to ascertain anything with respect to Lennox Hinds such as where his office was located? A. I knew where the office was located.

Q. Lennox Hinds' office? A. Well, I wouldn't say Lennox Hinds, I mean--I understood the whole group were working somewhere out of Bayard Street. That's all I knew.

Q. How did you ascertain that? A. It was common knowledge.

Q. By "the whole group" you meant including Lennox Hinds? A. I just associated him with everybody else.

Q. Did you— A. There were six other lawyers I think.

(93) Q. Did you cause inquiry to be made as to whether Mr. Hinds was a member of the Bar of the State of New Jersey? A. No.

Q. Did you know whether he was a member of the Bar of the State of New Jersey? A. I don't think I knew.

Plaintiffs' Exhibit 11

Q. Did you know whether he resided in Middlesex County? A. No.

Ms. Duncan: I'm sorry, what was the question?

Mr. Stavis: Whether he resided in Middlesex County or whether he had an office in Middlesex County.

A. I wasn't really interested in Mr. Hinds.

Q. Either before the alleged statements that he made to the press or afterwards? A. What do you mean by "afterwards"?

Q. After he made the alleged statements. A. You mean in that general period of time?

Q. Yes. A. No.

Q. Did you ever become interested in Mr. Hinds?

Ms. Duncan: Would you elaborate upon that question?

Mr. Stavis: The Judge asked me what I meant by "afterwards." It was a pregnant counter- (94) question.

Ms. Duncan: Did he ever become interested with Hinds in connection with these proceedings or his statement?

Mr. Stavis: Whatever the Judge had in mind.

A. Nothing in connection with these proceedings.

Q. Did you ever make inquiry as to his association with the Heritage Foundation?

Mr. Moore: Objection, I don't see the relevancy of that and the disciplinary proceedings.

Mr. Stavis: The question is whether anything that the Judge did was in pursuit of Mr. Hinds.

The Witness: Absolutely not.

Plaintiffs' Exhibit 11

Q. So that will you now answer this particular question, maybe it will be— A. What's the Heritage Foundation?

Q. If that's the question, then the answer is no. A. Right.

Mr. Stavis: May we be excused for just a moment.

(There is a brief recess.)

Q. I just want to make sure of a number of things. I asked you questions about communication with the Middlesex County Ethics Committee with respect to this matter and I think your answer was negative. (95) A. Correct.

Q. I want to make sure that you understand that I'm referring to each and every member of that Ethics Committee or any of its agents or employees and the communication that I referred to were both direct and indirect. A. I don't even know who is on the Ethics Committee, I don't know if they have any employees.

Q. I want to make sure that you understand that I'm asking the same question with respect to communication with any member of the Prosecutor's Office as to the Lennox Hinds matter, I'm not asking you about other communications. A. Right, same answer, no contact.

Q. Now, have you had any communications with members of your staff, your own staff, in which you made any kind of inquiries about Lennox Hinds? A. Well, you are getting up to recent—how about in the last couple of months, is that what you are talking about?

Q. Yes, at any time. A. I don't think it's relevant to this situation at all. We have—he sent messages to me and I sent messages to him and we kid each other but it has nothing to do with this situation.

Plaintiffs' Exhibit 11

Q. But I'm talking with respect to the disciplinary proceeding. A. Nothing, no.

(96) Q. And you have made no inquiry to ascertain anything about Lennox Hinds— A. That's correct.

Q. Have you made any inquiry at any time about Lennox Hinds? A. I can't remember anything like that. He sent me his picture the other day as part of this facetious connection we have.

Ms. Duncan: That has nothing to do with the disciplinary proceedings at all.

The Witness: Completely irrelevant to this.

Mr. Slocum: I don't think he is asking that.

Ms. Duncan: No, he isn't asking about that.

Q. Have you had any communication with members of your staff as to what Lennox Hinds does? A. As far as I know he teaches a course in which one of the officers in the courthouse is a student, that's all I know. Beyond that I don't know what he does.

Q. Have you discussed Lennox Hinds with that student, with that officer and his student?

Ms. Duncan: I think we are getting into matters that have nothing to do with disciplinary proceedings.

A. It is pure joking. I don't know how he takes it but I think it is joking back and forth. Absolutely nothing (97) to do with this. That is an officer who has no authority, he is just an officer that's taking a course with Mr. Hinds, that's all.

Q. And joking or not and it may very well be joking, but have you sought to ascertain what Mr. Hinds actually does? A. By no means. I'm not interested in Mr. Hinds.

Plaintiffs' Exhibit 11

Mr. Stavis: It's been a pleasure.

The Witness: Good to see you again. I enjoyed associating with you today.

(Whereupon, the hearing is adjourned.)

[Certification Omitted in Printing]

Transcript of Proceedings

[Caption Omitted in Printing]

December 8th, 1978
Trenton, New Jersey

Before:

Clarkson S. Fisher
United States District Court Judge

Appearances:

Morton Stavis, Esquire
and
Bernard K. Freamon, Esquire,
Co-Counsel for Plaintiffs.

John J. Degnan, Attorney General
By: Stacey L. Moore, Jr., Assistant Attorney General,
For Defendant Middlesex County Ethics Committee.

Spagnoli & Thuring, Esquires,
By: Richard M. Thuring, Esquire
For Defendant Edward J. Barone.

Testimony of David M. Foley, called as a witness for the Plaintiffs.

(22)* David M. Foley, having first been duly sworn, testifies as follows:

Direct examination by Mr. Freamon:

Q. Mr. Foley, what is your occupation? A. I am an attorney.

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* Figures in parentheses refer to each new page of the stenographic transcript.

David M. Foley, Esq.—for Plaintiffs—Direct

Q. How long have you been an attorney—in New Jersey, is that right? (23) A. Yes.

Q. How long have you been an attorney? A. I was admitted to practice law in New Jersey, I believe, in August of 1962, possibly September of 1962.

Q. And where do you practice? A. In New Brunswick. Now, in North Brunswick. Our office was in New Brunswick for a while. Now it is in North Brunswick, New Jersey.

Q. How long have you practiced law in Middlesex County? A. Since 1963, August.

Q. Now, you have brought with you—you have been asked to bring some documents. A. I have brought my file which is all that I have.

Q. Now, are you a member of Middlesex County Ethics Committee? A. Yes, sir.

Q. And how long have you been a member of that commitee? A. My term commenced January 1, 1976 and will conclude December 30, 1978.

Q. And now, the file that you brought with you, is that an Ethics Committee file or one of your (24) own files? A. That is my file as a member of the committee that I kept in connection with the Lennox Hinds matter. There is, I believe, another file kept by the secretary of the Ethics Committee which is the Ethics Committee file.

Q. Now, you kept a file in reference to Mr. Hinds for what purpose? A. I had been assigned by the Committee to commence and conduct a investigation into Mr. Hinds' conduct and for that reason, I maintained and kept a file.

Q. Now, that investigation that you were assigned to conduct, when did that commence? A. The Committee authorized me to commence an investigation, I believe, at our February meeting of 1977 and I think my first effort

in that regard was sending a letter to Mr. Hinds subsequent to that February meeting.

Q. Now, could you tell the Court briefly what kind of investigation was this? Well, let me ask you, the investigation is conducted under Rule 1:20. A. I don't have the rule in front of me. I don't know.

Q. Are you familiar with the term, statement of charges? (25) A. Yes, sir.

Q. Was the investigation prior to or after a statement of charges had been issued under the ethics procedure? A. Well, the investigation commenced prior to the issuance of the statement of charges.

Q. So it would be a pre-charge investigation, is that right? A. That's right.

Q. A preliminary investigation, is that right? A. An investigation.

Q. Now, about how many investigations have you conducted as a member of the Committee since you have been on the Committee there in Middlesex County? A. Specifically, sir, I do not know, but many.

Q. Many? A. Yes.

Q. Would you say twenty? A. Oh, at least.

Q. Would you say thirty? A. Possibly so.

Q. Now, tell the Court a little about what normally occurred during an Ethics investigation? (26) When you are assigned, what procedure do you use, aside from this investigation? A. This investigation was handled as any other investigation would be handled and the Committee or the secretary of the Committee would have received a complaint from possibly a private citizen or another member of the Bar or possibly a judge with regard to the conduct of an attorney and the secretary, I think under the old rules, would then assign this matter to a member of the Committee.

Q. Now, you mention the old rules. When did the old rules change? A. Specifically, I don't know. Recently.

Q. Recently? A. Yes, subsequent to this investigation.

Q. Subsequent to the filing of the statement of charges against Mr. Hinds? A. I believe so, yes.

Q. So you are saying that the Committee would assign someone to investigate. What would happen then? A. Well, the secretary would assign the matter to a member of the Committee if it came in by way of complaint. Matters didn't always come to the attention of the Committee by way of a complaint. Sometimes (27) members of the Committee would bring matters to the attention of the Committee as was done in this case and an investigation would be authorized, but in any event, however, the matter came before the Committee, the secretary would assign this matter to one of the members who would be charged with making the investigation and he would investigate or she could investigate this matter in any way that he or she saw fit to do so.

Q. Well, there are a few things that are done in most investigations with regard to ethics matters, is that right? A. If you will let me finish, I will tell you what is done.

Q. What are some of those things? A. Well, any person who may have knowledge of the matter would be interviewed, whether it be the person who made the complaint or names of people who were furnished by the person who made the complaint; the attorney, of course, who was the subject matter of the complaint, would be interviewed and the investigating member would do whatever he or she saw fit to thoroughly investigate the matter before reporting to the Committee.

Q. The Committee requires a thorough (28) investigation, is that right? A. The Committee requires an investigation. I don't know what you mean by thorough. I

would presume that anybody doing their job would perform a thorough investigation.

Q. And did you do a thorough investigation? A. Yes, sir.

Q. Now, you said that the Committee might interview, or the investigating member, might interview the respondent attorney; in other words, the person being investigated, is that it? Now, is that requirement—is the respondent attorney, does he have to be interviewed in a pre-complaint or pre-statement of charges investigation? A. You mean is he required to submit or is the investigating member required to request the respondent attorney to submit? I don't understand your question.

Q. Is the respondent attorney required to submit an interview by the investigating attorney? A. I know of no rule or law or statute that requires him to submit. In all instances, he is requested or she is requested to be interviewed with regard to the matter.

Q. But there is no compulsion to be interviewed, is that right? (29) A. If you are asking me for a legal opinion, I don't know the answer to that, Mr. Freamon. I know of nothing that requires an attorney who is being investigated by the Committee to submit to an investigation but maybe there is administrative directives that would require that. I don't know for sure.

Q. Do you know of any? A. As I sit here, no, I don't.

Q. Okay. Now, are you familiar with the National Conference of Black Lawyers? A. No.

Q. You are not? A. No.

Q. You have heard that name before, have you not? A. Yes.

Q. They are plaintiffs in this action, are they not? A. Yes, sir.

Q. Now, you heard or saw that name in January of 1977, didn't you? A. I may have. I don't know for sure.

Q. Do you know who the Executive Director of the National Conference of Black Lawyers was in January of 1977? (30) A. Do I know now or did I know then?

Q. Did you know then? A. No.

Q. You did not? A. Not to my recollection, I don't believe so.

Q. Now, what caused you to—well, I believe you testified that this particular investigation, with respect to Mr. Hinds, was initiated by you? A. No, that is not correct. The investigation was authorized by the Committee. The individual members of the Committee do not initiate investigations. They have to be authorized to investigate. I brought the matter to the attention of the Committee in February of 1977.

Q. You did? A. Yeah, but I would not, on my own, initiate an investigation. I would bring material to the attention of the Committee and then the Committee would, either authorize an investigation or not authorize an investigation, depending on how they felt about the matter.

Q. So you brought the matter with respect to Mr. Hinds to the attention of the Committee? A. Yes, I did.

(31) Q. So there was no complaint in this case, is that right? A. At that time?

Q. Yes. A. There is presently pending a statement of charges, but at that time, there was no complaint, no.

Q. There was no complaint from any judge, is that right? A. No.

Q. No complaint from any witness? A. No.

Q. There was no complaint in the Assata Shakur trial or any other trial. A. That's right.

Q. No complaint from any other attorney, is that right? A. No.

Q. And no complaint from any private citizen? A. You are correct.

Q. Now, you have a letter in your file dated January 28, 1977. A. Yes.

Mr. Freamon: Can I have that marked (Whereupon letter dated January 28, (32) 1978 is hereby received and marked P-1 for identification.)

Q. Mr. Foley, I show you what has been marked P-1 for identification and ask you if you know what that is. A. Yes, I do.

Q. Could you tell the Court, please, what it is? A. This is the letter, your Honor, that I sent to the secretary of the Ethics Committee who was then Matthias D. DiLeo. The letter transmitted to Mr. DiLeo copies of newspaper articles of the *Daily News* and the *Newark Star Ledger* which contained certain comments which had been attributed to attorney Lennox Hinds. I had indicated in my letter to Mr. DiLeo that I felt that there might very well be a violation of one or another of our disciplinary rules and code of ethics and I requested that Mr. DiLeo circulate copies of the articles among the Ethics Committee members in order that I might discuss it with the Committee at the following meeting which was to have been in February.

Q. The letter also says, does it not, Mr. Foley, that if the Committee should decide that it should be investigated, that you would like to (33) investigate this matter; is that not true? A. Since I was familiar with it, yes.

Q. Well, you were familiar with it, only by way of the newspaper articles, isn't that right? A. Right, that is correct.

Q. Now, at that time, how much did you know or—strike that.

There was a trial in progress in Middlesex County at that time, is that right? There were several trials, I know that, in the courthouse but one trial in particular, the Assata Shakur trial, is that it? A. Is that the Chesimard trial?

Q. Yes. A. Yes, it was at some stage, I believe, at that point in time.

Q. You were somewhat familiar with that trial at that time, were you not? You knew something about it, didn't you? A. Yes.

Q. It was, as I believe you previously testified it was a matter of some celebration; it was a celebrated case in the area at that time? A. Yes.

Q. There were prominant attorneys, Mr. Kuntzler, and others, is that true? (34) A. That wasn't the reason that it was celebrated. I don't know what you mean by prominant attorney.

Q. Well, do you know Mr. Kuntzler? A. No.

Q. You don't? A. No.

Q. You've heard his name. A. Yes.

Q. Would you characterize him as a prominant attorney or not?

> Mr. Moore: I object, your Honor. I don't see what relevance that has.

A. I would say yes if that, you know, would make him feel good. He is prominant.

David M. Foley, Esq.—for Plaintiffs—Direct

Q. You knew a lot about the trial, didn't you, at the time those articles appeared? A. What do you mean by a lot? I don't understand your question.

The Court: Had you followed it closely?

The Witness: I had only—all I knew about the trial was what I had read in the papers and, of course, it was in the papers every day.

Q. So you knew who the attorneys were who were involved in the trial at that time. A. I knew that Mr. Kuntzler was representing Ms. Chesimard (35) and I knew that Mr. Barone was prosecuting the matter on behalf of the State. I didn't know of any of the other attorneys involved, either on the side of the Prosecutor's Office or on the defense side of it.

Q. How long had you known Mr. Barone prior to January 28, 1977? A. Oh, my guess would be that I probably met Mr. Barone maybe ten years before that. Whenever he started practicing in New Brunswick. I think I practiced there before he did, so whenever he started practicing in New Brunswick, I would have undoubtedly met him then.

Q. Would you say he was a friend of yours? A. I would say so, sure.

Q. You saw him frequently, is that right? A. Well—

Q. Once a week, twice a week? A. Oh, Mr. Freamon, I don't know. Over ten years, there would be times when I would see him once a week, there might be times when I wouldn't see him for six months. If—you know, you are dealing with New Brunswick and New Brunswick is a rather small town and I would see him on the street from time to time so that in that respect, I knew him, but the frequency with which I saw him, I couldn't even hazard a guess at that, sir.

Q. Well, you told me during the depositions, (36) did you not, that you saw him about once a week? A. That would be a fair guess or estimate over a ten-year period of time, sure.

Q. And you also told me that you had asked him about the case, the Chesimard case, prior to the time of this incident, the alleged statements, isn't that true? A. I may have. I don't recall any specific time but I knew that he was very much involved in the case and if I did see him on the street, undoubtedly I would have asked him, how are you doing with the case.

Q. Now, you say in January of 1977, you didn't know who the Executive Director of the National Council of Black Lawyers was. A. To my knowledge, no. I do know that at some point in time, I received correspondence from all sorts—from various sources, one of which might very well have been that source but, specifically, I don't recall whether I knew it then or not.

Q. Now, the newspaper articles that are referred to in P-1 for ide. 'ification, the *Daily News* and the Star Ledger articles, do you have those with you, the original ones? A. I have some copies. I don't know that I have any originals. Some copies have been made, you know. I think at the deposition, we looked for the originals in my file, (37) if you will recall. I don't think we found it but we had copies and we had them marked at the deposition.

Q. All right. I will show you my copy which has been previously marked and ask you if these are the same copies of the two articles that you have in your file.

Mr. Freamon: Could I have these marked?

(Whereupon newspaper articles are hereby received and marked P-2 and P-3 for identification, respectively.)

Q. (Continued) I show you what has been marked P-3 for identification and ask you if that is the article that you transmitted or a copy of that article that you transmitted to Mr. DiLeo? A. It appears to be, yes.

Q. I show you P-2 and ask you if that is also a copy of the article that you transmitted to Mr. DiLeo? A. P-2 is the *Daily News* article and P-3 appears to be the *Star Ledger* article.

Q. Are they two copies of the article that was, at one time or now, reside in your file? A. They appear to be photocopies.

Q. Now, referring to P-3, what newspaper is that? A. That is the *Star Ledger* article.

Q. Now, does it refer to Mr. Hinds, the article? (38) A. Yes.

Q. And it indicates, does it not, that Mr. Hinds is the Executive Director of the National Conference of Black Lawyers, does it not? A. Yes.

Q. So you did know who the Executive Director was at that time, is that right? A. Reading this article, yes. Obviously, I did, because I read the article.

Q. Now, showing you what has been marked P-3—P-2, I'm sorry, it also refers to Mr. Hinds, does it not? A. Yes, sir.

Q. Now, during that time did you know who the attorneys were involved in the Chesimard case?

The Court: I think he's answered he knew of Mr. Kuntzler and he knew Barone but the assistants he didn't know.

The Witness: Your Honor, I would say that I probably did then know because from time to time their names would be in the paper and I knew more than one attorney was there. You know, if I

read the articles, they certainly will refresh my recollection. I think Mr. Myers was also representing Miss Chesimard and if you told me the names of the other attorneys, sure, I would remember.

(39) Q. You would remember? A. Yes.

Q. Isn't it true, Mr. Foley, that this article marked P-3 in fact indicates that Mr. Hinds was not a member of the defense team? Isn't that true? A. Do you want to show me where that is so I don't have to read the whole thing?

Q. First, second, third, fourth, fifth, sixth, seventh, eighth, in the ninth paragraph, it says he is not a member of the defense team. A. The article says that Mr. Hinds had represented Chesimard in a separate federal civil suit but is not a member of the five-lawyer defense team headed by William Kuntzler. That is what the article says.

Q. Did that jive with your knowledge of the case at the time? Did this article, the information in this article, did it comport with your knowledge of the case at that time? A. My knowledge of the case was the articles. I didn't have any independent knowledge of what was going on, other than what I would read in the articles, so that was my knowledge.

Q. Well, you said you had been around the courthouse and talked to Mr. Barone, is that right, during that time? (40) A. No, I didn't say that.

Q. Well, you did say that you had some knowledge with respect to who the attorneys were. A. Yes.

Q. Did that just come from the newspapers or from other sources? A. Oh, I would guess that the source of my knowledge that Mr. Kuntzler was representing Miss Chesimard may have come from any number of sources and the same with Mr. Barone. I knew that Mr. Barone for many, many, many months before that was the as-

sistant assigned to handle the case. What the source of that knowledge was, I wouldn't have any idea.

Q. Now, is it fair to say, Mr. Foley, that you knew Mr. Hinds was not an attorney of record in the Chesimard case? A. Oh, yes, that is—I determined that myself by contacting Mr. Barone's office.

Q. Subsequently? A. Yeah, when I was investigating the matter because I felt that it would have been of some significance as to whether or not he was an attorney of record as opposed to someone simply associated with the defense team.

Q. But you knew it before you wrote that letter, that letter that has been marked P-1, didn't you? You knew that he was not an attorney in the case, an attorney (41) of record. A. I had not—no, I only know what I had read.

Q. Well, what you had read indicated that he was not a member of the defense team, at least with respect to what has been marked P-3, is that right? A. The newspaper article said that apparently he said he was not a member of the defense team. The only way I could verify that was to check with, either the court or the Prosecutor's Office to find out who were the attorneys of record.

Q. And the newspaper article also said he is the Executive Director of the National Conference of Black Lawyers, didn't it? A. Yes, it did.

Q. Is that right? A. Yes, it is.

Q. Now, you referred to a case in your letter which has been marked P-1, the Mazacca case, is that right? A. That's correct.

Q. Now, Mr. Mazacca was brought up on disciplinary charges, was he not? A. That's correct.

Q. And the subject of that disciplinary charge ended up or resulted in some discipline, is that correct? A. I don't recall that.

(42) Q. Now, Mr. Mazacca was the attorney of record for which he was disciplined, is that true? A. My recollection about that case was yes, that he was representing someone before a tribunal at the time that certain things occurred which later became the subject matter of an ethics proceeding.

Q. Now, did you do anything else prior to the meeting, first agenda meeting of the Ethics Committee, where the Hinds matter was discussed with respect to this investigation? A. Well, the investigation, okay, per se, didn't commence until after the February meeting. After sending the articles to Mr. DiLeo on January 28th, which is the date of the letter, and prior to the meeting of the Committee which I believe was around the 15th of February, I don't recall specifically doing anything more with regard to the matter.

Q. Did you check into any—withdraw that.

Well, did you read any opinions with respect to, read any ethics opinions with regard to what the responsibilities of an attorney of record would be in a case with respect to public statements or did you look at the rules or do anything in that regard? A. At that time, no, I don't believe I did. I think that was all done subsequent to the February meeting. It is (43) possible though, Mr. Freamon.

Q. It is possible? A. Oh, it is certainly possible.

Q. Now, you wanted to investigate the particular matter, is that true? You desired to investigate it yourself. A. Well, insofar as I was bringing the matter to the attention of the Committee, if the Committee chose to authorize an investigation, since I had brought the matter to the attention of the Committee, I was prepared to investigate it. Any time a member of the Committee would bring a matter to the attention of the Committee, if an

investigation was to ensue, that was the member who was assigned to investigate the matter. That is generally what happens.

Q. That is generally what happens? A. Yes, I believe that was generally what happened.

Q. Each time a committee member brings a matter to the Committee for its attention on, basically, your own motion, would that be a fair characterization of what happens, on your own motion, you bring a matter before the Committee? A. As a member of the Committee, we have an obligation to bring matters to the attention of the Committee that we believe require review and if I was at that point in time (44) burdened by, let's say, too many investigations, that I wasn't able to get to all of them, I would have probably told our secretary, maybe you could assign this to someone else and I don't remember what my investigation load was at that particular point in time, but I obviously felt that if there was to be an investigation, that I had, at that point in time, the time to handle it but it was not any desire, okay, as you use the word. I had no desire to investigate the matter.

Q. Well, your letter which is marked P-1 indicates that you request the matter be assigned to you. A. Yeah.

Q. All right. So you did want to investigate it or you did have some desire to investigate it, I am sure.

Mr. Moore: Your Honor, I think the letter speaks for itself. I don't understand why counsel is belaboring this point.

The Court: Well, he has explained it. I don't think anybody wants to investigate an Ethics Committee matter but I take it, I get the clear inference that as long as he brought it to them, he must have read it and been at least disturbed to some extent by it and sent it in, he said, I'll investigate it.

David M. Foley, Esq.—for Plaintiffs—Direct

Is that what about happened?

(45) The Witness: Correct, sir.

Mr. Freamon: May I have this marked?

(Whereupon letter is hereby received and marked P-4 for identification.)

Q. I show you what has been marked P-4. Tell the Court what that is. A. Yes, this the letter that I sent to Mr. Hinds advising that I had been designated by the Committee to conduct an investigation to determine whether he had violated any of the disciplinary rules of the Code of Professional Responsibility.

Q. Now, in that letter, you indicate, do you not, that you have been advised that Mr. Hinds had convened a press conference? Is that true? A. That is correct.

Q. Now, had anyone in fact advised you of that? A. Well, I had read in the newspaper articles that these statements had been made by Mr. Hinds at a press conference. As to who actually convened the conference, I don't know.

Q. You don't know? A. I don't know whether he called it or someone else called it.

Q. You didn't know? A. No, it was immaterial as far as I was concerned. (46) The fact is that the statements were made at a press conference.

Q. And you didn't know whether he had convened it or not, is that right? A. That is correct.

Q. And there had been no complaints from any citizen or any person or any judge, excuse the reference, any person with respect to the conduct of Mr. Hinds, is that it? A. No complaints.

Q. Now, the letter also refers to allegations, isn't that true, allegations that he had said certain things, is that right? A. Yes.

Q. Now, there were no allegations in the formal sense of the word, other than the newspaper articles, isn't that true? A. Well, what do you mean, normal sense of the word? The newspaper articles attributed certain statements to Mr. Hinds of having been made by him.

Q. But there was no complaint from any citizen or any judge or witness. A. No, no complaint.

Q. So up until the point in time that you sent that letter, the only person who was complaining against (47) Mr. Hinds was primarily yourself? A. It was no complaint, there was no complaint pending. It was simply an investigation.

Q. You indicated in your letter to the secretary that you thought that the matter violated the disciplinary rules, is that right; that the statements violated the disciplinary rules. A. What letter are you referring to?

Q. What has been marked P-1, and that it was unethical conduct, is that right? A. It was my opinion when I read the news articles that if verified that these statements had actually been made by Mr. Hinds, that it was my personal opinion that these comments violated one or another of the disciplinary rules, yes.

Q. All right, and you brought this matter before the Committee and the Committee authorized you to investigate it, based upon your statement, the statement you just made, which I assume you made at the meeting in February. A. The Committee authorized me to commence the investigation based upon, of course, what was discussed before the Committee and based upon the newspaper articles that the Committee read. They were present at the meeting.

Q. Now, how long did that investigation ensue? (48) A. Well, it would have continued up to the point in time when I submitted my report to the Committee.

Q. When was that? A. Which is dated December 22, 1977, but the report actually, I think, was submitted in November of 1977. Then I believe following, the following of the report, a statement of charges then was issued by the Committee to Mr. Hinds and since the issuance of the statement of charges, there has been no further investigation into the matter.

Q. Now, if I may go back a minute, you said the matter was discussed at the February, 1977 meeting at the time you brought it up to the Board. A. That is correct.

Q. What was discussed, specifically? Do you recall? A. Well, I believe the secretary of the Commitee had, at my request, circulated the newspaper articles and at the conclusion of the business portion of the meeting, we had any number of 50 or 60 matters which were discussed and were agendized by our secretary which was the standard procedure. At the end of that, I requested the Committee to sit and discuss with me these newspaper articles. I wanted to get their thoughts as to the articles and the comments made in the articles. I gave them my opinion as to what I thought about the comments and inquired as to whether (49) or not the Committee felt that this matter should be investigaed. That is essentially what occurred.

Q. Now, did the Committee consult the rules at the time of this discussion in February? A. I don't recall, Mr. Freamon, whether the Committee consulted the rules at that time.

Q. Well, you make reference in your letter to specific rules that you felt had been violated. In P-1 you say, "The comments are clearly in violation of our disciplinary rules." Was there any discussion at the meeting as to which rules had been violated? A. Yes, I informed the Committee concerning the rules that I felt were violated by this conduct.

Q. Do you recall what rules they were ? A. Offhand I don't. I could tell you by looking at my report, what rules were discussed. We were discussing the disciplinary rule, that is, DR 1-102, which deals with misconduct, we discussed DR 7-107D, which deals with trial publicity and we also discussed DR 7-106 which was, I believe, the Mazacca situation, but that had to do with the conduct of an attorney during the course of a proceeding and before a tribunal which this was not.

Q. Now, was it discussed—I assume then it was discussed, the fact that Mr. Hinds was not a member of the defense team at the February meeting or not? (50) A. My recollection, Mr. Freamon, is that at the February meeting I told the Committee that I felt that Mr. Hinds conducted a violation of the DR that was involved in the Mazacca case which was DR 7-106. That may have been the only DR discussed at that meeting.

Q. So you assumed then that— A. To answer your question, I don't believe that there was any discussion at that meeting with regard to Mr. Hinds' association with the defense team. That was the following meeting.

Q. The following meeting, so you assumed at the first meeting then, in spite of the article, that he was a member of the defense team or attorney in the case? A. I didn't assume anything. I read that he was holding himself out to be speaking for the defense team, had made certain comments publicly but I felt were violative of one or another of our disciplinary rules.

Q. And that would be Rule 7-106, specifically, is that correct? A. That was the first rule that came to my mind, 7-106. It later turned out, we weren't dealing with a 7-106 situation, but we were dealing with a 7-107 situation.

Q. Now, did you interview any witnesses with respect

to this investigation, and if so, whom? A. If I may refer to my report—

(51) Mr. Freamon: Yes. Can we have it marked? I have a copy.

(Whereupon report is hereby received and marked P-5 for identification.)

Q. (Continued) You are looking at what has been marked P-5? A. P-5 which is my report to the Committee bearing the date of December 22, 1977.

Q. Right, and I believe my question was, did you interview any witnesses with respect to the investigation? A. I interviewed by telephone, Lawrence Nagy who is the *Newark Star Ledger* reporter who authored the *Star Ledger* article. I also spoke to Daniel Hayes of the *New York Daily News* who authored the article in the *New York Daily News*. I later contacted Mr. Paul Springle who was connected with Channel 52, Public Broadcasting Authority, to determine whether or not Channel 52 had given any coverage to this, to these press conferences. Mr. Springle referred me to a Mr. Perkins who was the director of the news and public affairs of the Public Broadcasting Authority and Mr. Perkins corresponded with me.

Q. Can I ask you a question? A. Can I finish?

Q. Yes. A. I believe, Mr. Freamon, they were the only people (52) that I spoke with when I conducted this investigation.

Q. So you spoke with three witnesses, all newspaper personnel or press personnel. A. Correct.

Q. Did you interview the judge in the Assata Sekur case? A. No.

Q. Did you interview the prosecutor? A. No.

Q. Did you interview any member of the defense team? A. No.

Q. Did you interview any attorney of record in the case? A. No.

Q. Did you talk to or contact the National Conference of Black Lawyers as part of your investigation, other than seeking to reach Mr. Hinds? A. No.

Q. Did you interview any member of the Prosecutor's staff? A. No, I didn't interview anyone. I did contact the Prosecutor's Office to determine a couple of facts. One thing I was interested in knowing was whether or not Mr. Hinds was an attorney of record and I think to that end, I contacted (53) Mr. Barone's secretary or possibly another lawyer in the Prosecutor's Office and I was told he was not an attorney of record and I also wanted to know when the jury selection in the Chesimard case began and ended because it was my understanding that these conferences, this conference or how many there were, I don't know, they occurred during the jury selection process and I wanted to verify that and I did verify that, that it was during the jury selection process.

Q. But you interviewed no juror, is that right? A. (Witness nods negatively.)

Q. And you interviewed—did you examine the court file? A. No.

Q. So I take it then, the only witnesses that you used in compiling—the only statements of witnesses that you used in compiling this report was the press personnel, primarily. A. That is correct. I verified with the press personnel that these statements were accurate or accurately reported, I should say.

Q. Now, it is your testimony you never talked to Mr. Barone about the statements, is that right? A. That is correct,

Q. You never talked to the judge. (54) A. No.

Mr. Moore: Your Honor, it is getting very repetitious and I object. He has answered all these questions.

Mr. Freamon: I will withdraw it.

Q. Now, for what purpose do you do a report to the Committee? A. Standard procedure.

Q. And why is it done? A. To report to the Committee what the investigation disclosed, what it consisted of and it also contains recommendations to the Committee with regard to further action or no action.

Q. Well, your report recommended that Mr. Hinds be charged under the Disciplinary Rules, is that right? A. That is correct.

Q. Specifically, under what rule and could you read for the Court, please, the rules, the text of the rules. A. My report concluded that there were violations, in my opinion, or potential violations that would require a hearing, so let me go back for a minute.

Q. Well, does your report say potential violations? A. Well, my report says—

(55) Q. —that there were violations, is that not true? A. Yeah, that is my opinion. At that point in time, that was my opinion but that it not a determination. That can only be—a determination can only be made after there has been a hearing. It was my opinion that the conduct violated DR 1-102 which was misconduct, which recites as follows, and that is DR 1-102A-5.

Q. Which says, what? A. "A lawyer shall not engage in conduct that is prejudicial to the administration of justice." And DR 7-107D, dealing with trial publicity which cites, "During the selection of a jury or a trial of crim-

inal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall make or participate in making any extrajudicial statements that he expects to be disseminated by means of a public communication and that relates to the trial or other matters that are reasonably likely to interfere with a fair trial."

Q. Now, you do, on page 1 of your report, indicate that you knew that Mr. Hinds was not a member of the defense team, is that right, that you had learned that? A. My report says that Mr. Hinds was not one of the attorneys who represented Miss Chesimard at the trial.

Q. And you also indicate that he did not appear— (56) on page 2 don't you indicate that he did not appear, either in the criminal actions or in the removal petition which pertained to that criminal action? Isn't that true? Don't you indicate that? A.My report says that Mr. Hinds did not appear as attorney in either the criminal trial before Judge Appleby or on the petition to have the case removed from the State Court to the Federal Court.

Q. So, Mr. Foley, what evidence did you bring to the Committee, other than your opinion that the conduct violated the Disciplinary Rules involved? A. Well—

Q. Just answer my question. A. Okay, I will.

Q. What evidence did you bring to the Committee other than your opinion? A. Well, in one of the articles, Mr. Hinds had apparently, at the press conference, represented himself as a person speaking on behalf of the defense team because the defense team had been gagged.

Q. Right. You made reference to that in your report, didn't you? A. Yes.

Q. In other words, the defense team could not speak, isn't that so? (57) A. I don't know what the defense could or could not do.

David M. Foley, Esq.—for Plaintiffs—Direct

Q. Mr. Hinds said that it was his understanding that the defense team should not be speaking about the case. Didn't he say that in the article and didn't you make reference to that in your report? A. In the article which was reported by Mr. Hayes, that is the *Daily News* article, in referring to Mr. Hinds, the article says he said he was speaking for the defense team because the members were gagged by Judge Appleby who he accused of asking prospective jurors self-serving questions.

Now, it was my opinion that DR 7-107 which pertains to and deals with conduct of persons associated with the people who are trying cases and I felt that his conduct was a clear violation of that particular Disciplinary Rule.

Q. Well, DR 7-107 indicates, does it not, that the conduct must be such that it is reasonably likely to interfere with a fair trial, isn't that so? A. That is correct.

Q. And as a matter of fact, on the last page of your report, you make the following statement: "Clearly, these extra-judicial statements related to the trial and were also reasonably likely to interfere with a fair trial in that the statements were designed to influence the prospective jurors." (58) A. That is correct.

Q. Did you have any evidence of that other than your opinion? A. That was my opinion.

Q. Did you have any evidence that any jurors were influenced? A. No, but that is not required. Reasonably likely to influence the thinking of prospective jurors.

Q. Did you have any evidence, Mr. Foley? A. That any jurors had been influenced?

Q. Right. A. No.

Q. Or that the trial was in any way influenced by the statements? Did you have any evidence? A. No.

Q. So the only thing you gave to the Committee was your opinion? A. That is correct.

Q. And that is the same opinion that you had when you first wrote the January 21st letter, isn't that so, what has been marked P-1? A. No.

Q. It is not the same opinion? A. The January 28th letter referred to the Mazacca situation. Okay. It did not turn out to be a Mazacca (59) situation. Mazacca dealt with DR 1-106 or DR 7-106 and that turned out, in my opinion, to be a violation of DR 7-107.

Q. Well, just give me a second.

Don't both rules, Mr. Foley, refer to conduct that is reasonably likely to interfere with the matter? A. You have to show me the rules. I don't know. I know one pertains to comments that are made during the course of a proceeding and the other deals with trial publicity.

Q. And the intention of the rules is to prohibit publicity which would interfere with the fair conduct of a trial, is that not so; both rules, the Mazacca situation and the situation we are involved with here? Isn't that so? A. No. The rules deal with what was the expectation of the person who is making the statement. All right. The rule does not require that there has to be actual influence of the fair trial or of a prospective juror or anything like that. The rule states very clearly that the attorney shall not make the statement that he expects to be disseminated by means of public communication and that relates to the trial or other matters that are reasonably likely to interfere with the fair trial. It deals with the expectation of the attorney who is making the statements and what he is trying to accomplish. That is what the rule deals with.

(60) Q. I understand that, but the purpose of the rule is to prevent and the reason why you function in your

capacity as a member of the Committee is to prevent misconduct which would prevent interference with—prevent the conduct of a fair trial, isn't that so? A. I don't understand that question at all.

Q. The reason why these matters are investigated is to prevent attorneys from interfering with a fair trial of a matter, isn't that so, or to prohibit that kind of conduct, isn't that so? A. No, I would not agree with that. The purpose of an investigation is to prevent anything from happening. The purpose of the investigation is, the purpose of the rule is to establish a code of conduct that an attorney is obligated to follow when he is acting as an officer of the court and—

Q. I understand that. A. —and the DR is not designed to prevent anything. The Rules sets up a standard as any criminal statute sets up a standard of conduct and if there is a violation of that standard, sanctions can then follow.

Q. Well, why do we have criminal statutes, Mr. Foley, to punish the offenders?

> Mr. Moore: Objection, your Honor. I don't see any relevance at all to that question. I think we should confine ourselves to the rules in question (61) in this case and I think that we are belaboring this.
>
> The Court: We may be getting into a philosophical discussion of criminal law which I would just as soon abort at this time.
>
> Mr. Freamon: I understand.

Q. It is fair to say that what you brought to the Committee which was brought by virtue of what I believe is P-6 was your opinion. There was no evidence other than your opinion, is that right? A. Evidence of what?

Q. No evidence of any interference with the trial that is the subject matter of the investigation. A. That has never been an allegation, that is, conduct actually interfered with the conduct of the trial, Mr. Freamon. That is not the DR. That is not what the rule calls for.

Q. Mr. Foley, you are not answering my question. Isn't it true that your report brought the Committee no evidence of any prejudice to the trial or any interference to the trial, other than just your opinion that the conduct might have interfered with the trial? Isn't that so? A. Well, that is a double question. My report does not—

(62) Q. I will rephrase it. A. My report does not contain any information or any evidence that Mr. Hinds' statements actually interfered with the conduct of the fair trial.

My report does contain my opinion that his statements could have a propensity to influence the trial but we are not dealing with whether, in fact, the trial was influenced, we are dealing with the conduct of the attorney in making certain statements.

Q. I understand that and I understand what you said and what I am asking is a simple question: Does your report contain any evidence that the alleged conduct interfered with the Assata Shakur trial? A. No.

Mr. Moore: Objection. He's answered the question three times.

The Court: He's answered again, no.

Mr. Freamon: May I have this marked, please?

(Whereupon a memorandum is hereby received and marked P-6 for identification.)

Q. Now, Mr. Foley, you did do some research into the applicability of these rules that we have been (63) talking about, did you not? A. Yes, I did.

Q. And that, I assume, you did over the course of your investigation. A. That is correct.

Q. Now, you dictated a memorandum to yourself at some point after the initiation of the investigation, did you not? A. That is correct.

Q. I show you what has been marked P-6 and ask you if that is your memorandum, a part of your file? A. That is a memorandum that I dictated to my file, correct?

Q. Is that an accurate copy of the memorandum that you have in your file there? A. I believe it is.

Q. Now, in that memorandum, Mr. Foley, you talk about the rules that we have been talking about here in court, don't you? A. That is correct.

Q. And in the memorandum, don't you say that there does not appear to be a violation of DR 7-107, the very rule we have been talking about? A. That is the way the memorandum reads, that is (64) correct.

Q. Well, is that what it says? A. Yes.

Q. And that is a memorandum that is in your file, is that right? A. That is correct.

Q. Now, when did you dictate this memorandum, if you know? A. I don't know.

Q. Was it prior to or after the issuance of the statement of charges? A. Oh, I am certain it was before the issuance of the statement of charges and my—I am certain it was before the issuance of the statement of charges but at what point in time I actually dictated the memorandum, I don't know, Mr. Freamon. It is not dated.

Q. Now, you make reference to the fact in your memorandum that the Committee should re-evaluate this matter based upon your misunderstanding of the Mazacca situation, don't you? A. That is correct.

Q. And doesn't it appear, Mr. Foley, from the third paragraph that you have concluded at that time the rules

that we have been talking about here (65) today are not intended to cover the conduct that is here in question? Didn't you come to that conclusion? A. Well, if you are asking me what the memorandum says or asking me what my conclusions were, if you are asking me what my conclusions were, my conclusions are not in accord with what the memorandum states and I explained that to you at the deposition.

Q. All right. You dictated this? A. Yes.

Q. You dictated it in order, I believe you testified at the depositions, to remind you about things that you had to do and things that were going through your mind, is that correct? A. That is correct.

Q. Why then—you say now that that was not your opinion at that time. Is that what you are saying? A. What wasn't my opinion?

Q. The rule was not intended to cover the conduct here in question. Are you saying that was not your opinion then? A. That is correct.

Q. Why did you tell me then, at the deposition, that you thought at that time, and I am referring to page 55 and I will show it to you, that (65) you thought, I will show you a copy, that the specific comments were not covered by the Disciplinary Rule? That is page 55, line 14. Was that a true statement that you made then? A. Let me read it a little bit and go back a little bit and see what we were talking about at the time of the deposition.

The Court: Did you say page 55, Mr. Freamon?
Mr. Freamon: Yes.

Q. I asked you a question at line 10, "So you mean that the specific conduct was not covered by any particular disciplinary rule," and your answer was, "The specific

conduct—" and you corrected me and you said, "the specific comments," and I said, "comments, all right," and you said, "that he made was not covered by a disciplinary rule, that is correct."

Now, was that your answer? A. I am trying to figure out what disciplinary rule we were talking about. That is my problem because I determined that DR 7-106 did not apply.

Q. Right. A. And that is why I went back to the Committee to discuss with them the DR 7-107.

(66) Q. In the memorandum that we have had marked here concludes that you should go back to the Committee and talk about your opinions in that memorandum, don't you? A. That is correct.

Q. And doesn't it refer to 7-107, the memorandum that we have marked? A. That is correct.

Q. So weren't you telling the truth, Mr. Foley, when you told me on October 30 that your opinion was that the specific comments that he made were not covered by a disciplinary rule? A. See, what I am trying to determine, Mr. Freamon, I am trying to see where we were during the course of the deposition because although it is encouched in question and answer form, we were conducting almost a colloquy as to what my impressions were at certain points in time and I think it is—Mr. Barone—

It is fully covered in here as to what we were—excuse me.

Q. Mr. Foley, I'm sorry. A. If I might—

Q. May I refresh your recollection? A. Sure.

Q. I showed you this memorandum and we (67) pulled it out of your file, isn't that right? A. That is correct.

Q. And we marked it P-7 for identification at page 45. A. That is correct.

Q. And then we began to discuss it. A. That's right.

Q. And I began to ask you questions about your opinion at the time, at the beginning of the investigation. A. That is correct.

Q. And I believe I asked you, when did you make the memorandum and what did you tell me, if you recall? A. I recall that I told you that I couldn't recall exactly when I made the memorandum but I concluded, based upon what was in the memorandum, that it was made sometime following the February meeting when I first went to the Committee and talked to them about a Mazacca situation and the second time that I went to the Committee, which would either have been in the March or April meeting when I had determined that it wasn't a Mazacca situation and since I had been authorized to investigate it, based upon the fact that we thought it was a Mazacca situation, since there had (68) been a change, I wanted to go back to the Committee to tell them that I thought that it didn't fit the Mazacca situation and see whether they wanted me to continue with an investigation under DR 7-107.

Q. And I asked you about DR 7-107 because it is referred to in the memorandum that has been marked? A. That is right.

Q. And you told me that that was your opinion that the conduct was not a violation of that rule, isn't that so? A. I don't—

Q. You did tell me—is that what the transcript says? Did you say anything else? A. Let me say this to you. From reading the transcript, Mr. Freamon, I can't tell what DR we are talking about, I can tell you this and I explained to you the circumstances under which I dictated the memorandum, that I believe that the memorandum that I dictated to myself was either incorrectly dictated or transcribed incorrectly but it has always been

my opinion in this matter that there was a violation or a potential violation of DR 7-107.

Q. Now, you told me it was a typographical error, isn't that what you told me? (69) A. I explained that to you, that I was sitting at my desk, all right, with mountains of work all around me, including Ethics Committee matters, and I had been thinking about the Hinds matter and I had certain thoughts in mind with regard to the disciplinary rules and I grabbed my dictaphone or transcribing machine and I whipped out into my machine the things that I had in my mind and I told my secretary to put that into memo form and put it in the file.

Q. Now, you testified— A. Let me finish. Let me finish. Okay. That was that.

Mr. Freamon: Well, your Honor, I would like permission—

The Court: Let him finish.

A. (Continued) That was done. It was transcribed by my secretary and it was put into the file. When I next saw that memorandum, I don't know, but I do know that the memorandum clearly says, and as you have pointed out in paragraph two, in referring to DR 7-107 and DR 1-102A, these last two DR's are very general in scope and I do not believe they are intended to cover the conduct that is here in question. Now, that is exactly how it reads and I explained to you that either I dictated that improperly or it was (70) transcribed improperly, I don't know, but that it was then and is now my opinion that DR 1-102 and DR 7-107 clearly cover this conduct.

Q. Mr. Foley, isn't it a fact that you initially told me at line 55, and we had had quite a discussion about it, that it was your opinion, that the conduct did not violate the rules?

David M. Foley, Esq.—for Plaintiffs—Direct

Mr. Moore: Your Honor, the witness qualified that on the next page. Page 56, as about the middle of the page, that is qualified.

Mr. Freamon: That's right. He qualifies it after a recess.

Q. There was a recess, was there not, Mr. Foley, before you qualified it? You had to take a break and think about it, isn't that so? A. I don't recall the purpose. As a matter of fact, I think you called the recess. I think you and Mr.—counsel—your co-counsel there, wanted to take some time and go downstairs. That is my recollection.

Q. Look at page 56. A. Maybe it wasn't.

Q. What is your testimony at the end of line 55? A. "Let's get the DR's out so we know what we are (71) dealing with." All right. "Do you have the rule book?"

I said, "Just give me a rule book."

Q. You wanted a rule book? A. There is a brief recess when I obviously read the rules.

Q. So the recess was for you to read the rules, is that right? A. That is what the record would indicate.

Q. That is all we have here, is the record, is that so? A. That is correct and then we go on to explain—

Q. Well, there is no question pending, Mr. Foley. A. All right.

Mr. Freamon: So the record is clear, your Honor, I would like to have Mr. Foley read the entire memorandum.

The Court: The entire memorandum? Are you going to put it in evidence anyway?

Mr. Freamon: Yes.

Mr. Moore: If it is going into evidence, I think it would speak for itself.

The Court: He may want—at this point in time, I see no problem with it.

(72) Mr. Freamon: Just for the record, he indicated subsequently in depositions that there may have been a problem in dictation and I want the memorandum clear.

The Court: You are ahead of me, Mr. Freamon. I already allowed it.

Mr. Freamon: Thank you, your Honor.

Q. Would you read the memorandum? A. It is entitled, Memorandum Re: In the matter of Lennox Hinds, Esquire:

"Matt DiLeo will send the Ethics opinion over to Doug Hayes' office and we should pick them up. This matter should again be reviewed by the Committee before we determine whether or not to file a statement of charges and have a hearing. There does not appear to be any specific violation of DR 7-106 and DR 7-107."

Q. Now, was that a typographical error? A. No, I can explain that to you very clearly.

Q. Just answer my question. Was it a typographical error? A. No.

Q. Go ahead? A. "Nor does there appear to be a violation of DR 8-102 which deals with statements concerning judges. With regard to DR 8-102B, the rule states (73) that a lawyer shall not knowingly make a false accusation against a judge. If you proceed under this rule, it would draw directly into question the truth or falsity of the statements made by Lennox Hinds which would, in essence, require us to determine the qualifications of Judge Appleby. This obviously we do not

wish to do. DR 7-107D speaks about lawyers makes extrajudicial statements about," and there is a quote mark there, "other matters that are reasonably likely to interfere with a fair trial. Also, DR 1-102A5 states that lawyers shall not engage in conduct that is prejudicial to the administration of justice. These last two DR's are very general in scope and I do not believe they are intended to cover the conduct that is here in question. When the Ethics Committee recommended that a statement of charges be filed at a hearing and a hearing held, it was with the understanding that the conduct of Lennox Hinds in making comments to the press was a violation of specific DR."

Q. Was that a typo? A. No, we were discussing DR 7-106.

Q. But it says a specific DR. A. DR 7-106. If you want some explanation, Mr. Freamon, this is a memorandum to myself incorporating (74) all kinds of things that I had in my noggin at the time and trying to memorialize them so when I got back to this file I would remember what I was thinking about.

Q. All right. Go ahead. A. "Since such is not the case"—

Q. "Not case." A. Obviously, another typo—"The committee should have an opportunity to reevaluate its position before recommended that a statement of charges be filed. In the interim, we will research this matter by reviewing the Ethics opinions." The final remark is, "Ed Barone's office has informed us that the jury selection began on January 17, 1977 and ended on February 15, 1977 in the Chesimard trial."

Q. Thank you. Now, so there was even some question during this investigation about your opinion concerning

the conduct which was the only thing the Committee really had at the time that you filed your report, isn't that so? A. I don't understand what you are asking me.

Q. You had some question in your mind about the opinion that you have expressed here today, that the conduct was a violation of the rules. A. There was—again, initially, I felt that the (75) conduct was violative of 7-106. Okay. I went to the Committee with that in mind and they authorized me to commence an investigation. In reviewing the matter, I determined that it wasn't a 7-106 matter, that was a Mazacca matter, but that it fell under 7-107. Since the Committee had authorized a 7-106 investigation and not a 7-107 investigation, I felt that I should go back to the Committee to see whether they felt the facts warranted an investigation under DR 7-107.

Q. And doesn't that memorandum indicate that you felt that there were probably was not any violation of 7-107? A. I have explained my memorandum to you. The memorandum says as it reads but I have told you that there has never been a time that in my opinion the conduct of Mr. Hinds did not violate 7-107 or at least, at least, warranted a hearing so that we could hear from Mr. Hinds as to why he made these statements and they were intended to be.

Q. Now, so the purpose for the filing of the statements of charges was to get a statement from Mr. Hinds to force Mr. Hinds to talk about the matter, isn't that what you just said? A. No, no.

(76) Q. Didn't you just say—could we have it read back?

(Whereupon the above answer is read back by the reporter.)

Q. So you concluded at that time that the only way to hear from Mr. Hinds was to file a statement of charges against him, isn't that so? A. That is not the purpose of having a hearing. I concluded—

Q. Please answer my question. You concluded at that time that the only way in which you could elicit a reponse from Mr. Hinds was to file—authorize the filing of a statement of charges or recommend it? A. That was not my conclusion, no. My conclusion was based upon what we had before us at that time, the newspaper articles and having nothing to refute them; that as members of the Committee appointed by the Supreme Court, we are obligated to file a statement of charges.

Q. You had nothing to refute them but you didn't interview the judge in the case. A. The judge wasn't at the press conference.

Q. But the statements were reported in the press. You interviewed the men from Channel 52, (77) is that right? A. Sure.

Q. And you looked at the newspaper articles? A. Sure.

Q. You didn't interview any jurors in the case, did you? A. No need to.

Q. You didn't interview the prosecutor, did you? A. No.

Mr. Moore: Your Honor, Mr. Foley testified about who he interviewed.

The Court: All right.

Q. So the only thing the Committee had before it was your opinion and the newspaper articles, isn't that so? Isn't that all they had? A. Yes, and their own opinions, obviously.

David M. Foley, Esq.—for Plaintiffs—Cross

Mr. Freamon: That is all I have of this witness.
The Court: Any questions?
Mr. Moore: Just a couple, your Honor.

Cross-examination by Mr. Moore:

Q. Mr. Foley, did Judge Appleby ever contact you in regard to the statements made by (78) Lennox Hinds on January 20, 1977? A. No, sir.

Q. At any time? A. No.

Q. Either by phone or by letter or through someone else? A. No.

Q. Did Mr. Barone ever contact you about the statements made by Mr. Hinds at any time? A. No.

Q. Did he ever bring pressure or encourage you to bring charges against Mr. Hinds? A. No.

Q. Did anyone at all contact you at any time, encouraging or putting pressure on you to bring charges against Mr. Hinds? A. No. The only—the only thing that occurred that I can remember, Mr. Moore, was that with regard to the articles that I had read, the *Star Ledger* articles, because I subscribe to the *Star Ledger,* I believe that it was one of my law partners that showed me the *Daily News* article and that is how I came into the possession of both articles but no one, at any time, asked me to do anything with regard to (79) the matter.

Q. Did you vote in favor of filing the statement of charges against Mr. Hinds? A. Yes, sir.

Q. What formed the basis of that decision on your part, to file the statement? A. Well, when I had—I concluded my investigation as far as I could take it. I had verified with the reporters that the comments that were attributed in quotes to Mr. Hinds were accurate, they reviewed their

notes and verified the accuracy of those comments. I had received a tape recording from the Channel 52 people which contained some comments that Mr. Hinds had made. There were no other people to interview who had any knowledge of that press conference, those statements. I had sufficient information with regard to the accuracy of the statements. I endeavored to speak with Mr. Hinds about the matter, to either affirm or deny that he said those things that were in the paper or if he said them, to explain them, to let me know the context in which they were made but I was unable to interview Mr. Hinds, so based upon what we had, certainly, in my opinion, there was a prima facie violation and I went to the Committee with my report and they authorized that based upon (80) what we had, to go forward with the statement of charges which was our obligation to do. If we had, at that point, just dropped the matter, we would not have been performing our function and duty as the Ethics Committee.

Q. Did you receive the cooperation of Mr. Hinds?

Mr. Freamon: I object to that. It is irrelevant.

The Court: Well, obviously, Mr. Hinds didn't talk to him. Now, you call it what you want. He doesn't have to.

Did you know Mr. Hinds at the time?

The Witness: No, sir.

The Court: Have you ever been on a speaking relationship with him?

The Witness: No. The first time that Mr. Hinds, I believe, was at the deposition, as I recall.

The Court: And it is your testimony that nobody had instigated this but yourself.

The Witness: That is correct, sir.

The Court: All right.

David M. Foley, Esq.—for Plaintiffs—Redirect

Q. Does the complaint have to be brought to the attention of the Committee by a third party or can (81) individual members bring possible violations to the attention of the Committee? A. Both are sources of the process. Matters are brought to our attention by private citizens, matters are occasionally brought to our attention by the courts and oftimes, an individual committee member will bring a matter to the attention of the Committee.

Mr. Moore: I have no other questions.
The Court: Anything else, Mr. Freamon?
Mr. Freamon: Yes, just a few questions, Judge.

Redirect examination by Mr. Freamon:

Q. Mr. Foley, I believe you testified on cross-examination that you interviewed the two newspaper reporters to ascertain the accuracy of the statements that were attributed to Mr. Hinds. Did you also seek to ascertain whether his statement, that he was Executive Director of the National Conference of Black Lawyers? Is that true or not? Did you ask about that? A. No, I didn't ask about that. I didn't think that that was particularly relevant. I was interested only in the quotes.

Q. Well, did you ask of either of the (82) reporters about his statement that he was speaking for the defense team because they could not speak or had been gagged? Did you ask about that? A. Specifically, Mr. Freamon, I don't recall.

Q. Now, I believe you testified on direct examination—a question asked by the Judge that you did not know Mr. Hinds at that time, is that right? A. That is correct.

Q. Now, don't you say in your letter which has been

marked P-1 that you believe that Mr. Hinds had an office in New Brunswick? A. That is correct.

Q. So you must have known something about him? A. Well, knowing something about someone and knowing someone are two different thing. I knew Mr. Hinds had an office in New Brunswick because he was listed in the Lawyer's Directory.

Q. You are sure you didn't know anything about him prior to making the reference in your letter? A. I think I told you at the deposition that the only knowledge I had of Mr. Hinds' existence was through my secretary who has been with me for about 10 years who, at one point in time, told me she worked (83) with Mr. Hinds in a day care program. That is the only thing I knew about him.

Q. So, how long had she been your secretary prior to January 28 of 1977? A. Well, she was with me for a couple of years and then departed the scene to have a few children and then she came back. I would say, all told, she had been with me eight years.

Q. Is that Mrs. Gargon? A. Alma Gargon.

Q. And she, at one time, worked for Mr. Hinds? A. I don't know whether she worked for him. I remember her telling me she knew Mr. Hinds and had worked with him in the day care program.

Q. Now, you also testified on cross-examination that you had not talked to Mr. Barone about the investigation, isn't that so? A. I don't think that was the specific question that was asked. I don't remember the specific question that was asked but I never talked to Mr. Barone about the investigation. That would be a correct statement.

Q. Well, then, why, Mr. Foley, did you tell me—so, this statement is not true and I will (84) read it to you

on page 34 of your deposition at line 22: "With regard though to Mr. Barone, other than those two calls that were made to his office, there may have been a time subsequent to that, that Mr. Barone inquired of me as to the status of this investigation of Hinds." A. Uh huh.

Q. Was that a true statement? A. That is true.

Q. So then what you told your lawyer on cross-examination then was not true? A. No, that is not—

Mr. Moore: I asked whether any pressure was put on—

Q. How many times did Mr. Barone inquire, referring to the status of this investigation, if you recall? A. I don't recall any particular time that he did. I think I told you at the deposition that there may have been a time during the course of the investigation that Mr. Barone inquired as to the status of the investigation. Okay. I have a faint recollection that there may have been such an inquiry.

Q. You have a faint recollection? A. Yeah, but I would have told him nothing about (85) the investigation and if, in fact, the question had been asked, I would have said, the matter is either pending or under investigation or concluded or whatever the status was.

Q. But you have known him ten years, is that right? A. Uh huh.

Q. You characterize him to be a friend of yours, is that right? A. Yeah.

Q. And on page 35 of the deposition, in answer to my question where I asked you, "When Mr. Barone asked you about the status of the investigation, he did that by phone or in person," and you answered, "I don't know. Again, I presume it was when we met each other down here

in New Brunswick one day or another," is that right? A. That is correct.

Q. So you met with him often during that time, isn't that so? It would seem you would see him in the courthouse, isn't that so?

Mr. Moore: Your Honor, we have been through this one time already.

The Court: I think so. He said he would average once a week. Sometimes he may (86) not see him for months, sometimes, more.

Mr. Freamon: That is all I have, Judge.

The Court: Thank you, Mr. Foley.

(Witness excused.)

All right. We'll break for lunch.

Mr. Foley: Your Honor, may I be released?

The Court: As far as I am concerned, you are.

Testimony of William C. Moran, Jr., called as a witness for the Plaintiffs.

WILLIAM C. MORAN, JR., having been first duly sworn, testifies as follows:

Direct examination by Mr. Stavis:

Q. Mr. Moran, are you a member of the Bar of the State of New Jersey? A. I am.

Q. Were you a member of the Middlesex County Ethics Committee at any time? A. I was a member of the Mid-

dlesex County Ethics Committee from approximately July of 1975 through the (87) end of March of this year.

Q. Were you ever chairman of that Committee? A. I was chairman of the Committee for the calendar 1977.

Q. Is that the period of time during which the Committee considered the Lennox Hinds matter; that is, considered whether to proceed on the Lennox Hinds matter? A. Yes, it was.

Q. Are you familiar with the work Mr. Foley did for the Committee in respect to that matter? A. I am familiar with some of it, not all of it.

Q. You appointed Mr. Foley as investigator in respect to this matter. A. I don't—the chairman of the Committee does not normally make the appointments as to the individual who is going to conduct an investigation. However, in this particular case, Mr. DiLeo who was the secretary of the Committee and I both referred the matter to Mr. Foley, I believe, at one of the Ethics Committee meetings because it was at a meeting of the Ethics Committee when this matter was first called to my attention.

Q. Well, hadn't Mr. Foley asked to be appointed to make this investigation? (88) A. He may have. I don't recall that.

Q. Let me show you a document that has been marked Plaintiff's Exhibit 1 and would you look at the last paragraph and see whether that does refresh your recollection as to whether Mr. Foley, in fact, requested that he be designated to make this investigation? A. This is a letter from Mr. Foley addressed to Mr. DiLeo, the secretary of the Ethics Committee.

Q. I understand that. A. And I did not receive a copy of it and it does not refresh my recollection.

Mr. Stavis: Can we place on the record the fact that Mr. DiLeo has been ill and for that reason we did not take his deposition and we were advised that he would be too ill in order to be deposed?

Mr. Moore: That is my understanding.

The Court: Do you have any knowledge of this?

The Witness: I have been informed that he was ill. That is all I know. He is no longer secretary of the Committee.

The Court: When did his term expire?

The Witness: I believe around the (89) beginning of this year.

The Court: But he was the secretary from at least February until the end of last year.

The Witness: Yes, that is correct.

Q. Now, this matter of the Lennox Hinds case was discussed by the Committee as a whole during the period of your chairmanship. A. That's correct, on several occasions.

Q. And Mr. Foley presented it, is that correct? A. I don't know quite what you mean by the use of the word, presented. Mr. Foley was the one that initiated the matter before the Committee originally in the early part of 1977. The Committee has a term which it refers to somebody as a presenter but that only happens if the statement of charges has been filed and a hearing is held.

Q. Now, did Mr. Foley ever call to your attention that in his opinion, there was no specific disciplinary rule which was being violated by Mr. Hinds? A. Mr. Foley and I had a conversation, I believe it was a telephone conversation, I am not quite clear as to the detail, sometime during the year, 1977 when he expressed doubt as to which disciplinary rule, (90) or if any disciplinary rule was directly

in point in connection with the Lennox Hinds investigation.

Q. Do you recall that I asked you that exact question at the deposition? A. Yes, sir.

Q. And that the answer you gave was—well, perhaps you want to read the answer that you gave. A. "At one of the meetings."

Q. Well, it starts—yes, go ahead. A. "At one of the meetings sometime in the summer of last year, I forget the exact meeting, Mr. Foley indicated he had some doubts in his own mind as to whether or not there was a DR that was in fact being violated."

Q. And do you recall that I asked you, when did you think he did this and perhaps you want to refresh your recollection as to the answer that you gave. A. I said that I didn't recall the precise meeting but I thought it was June or July of last year.

Q. And would you refresh your recollection as to the manner in which you continued your response to that question? A. I said that there was some discussion of the (91) matter among the members of the Committee. Do you want me to paraphrase what you said.

Q. No, I prefer that you read it. A. "There was some discussion of the entire matter then and there was discussion that if Mr. Hinds was associated with the defense of the case, in fact, a DR would have been violated if the statements attributed to him in the press were accurate and Mr. Foley was instructed to proceed with his investigation on that basis."

Q. This was after, as you said, Mr. Foley indicated that he had some doubts in his own mind as to whether or not there was a DR that was in fact being violated. That is what you testified to. A. Yes, that is correct.

William C. Moran, Jr., Esq.—for Plaintiffs—Direct

Q. So that the issue, as the Committee saw it, was whether Mr. Hinds was associated with the defense of the case. A. That was one of the major issues, yes.

Q. Well, look at your answer. Was there any other issue? A. Yes, sir.

Q. What was the other issue? A. I didn't say there was only one other issue but at least one of the other issues is whether or not (92) the newspaper comments attributed to Mr. Hinds were accurate. There was also a question that was raised by some of the members of the Committee. Remember, we are dealing with a committee that has nine members and nine disparate opinions as to whether or not the comments made by any attorney under any circumstances would have been a violation of a DR.

Q. Did they have any DR's that they cited in support of that opinion? A. I believe the question arose as to, I am very bad on numbers, but I believe it is DR 1. If I could get the rule book, I could cite you the specific DR.

(Mr. Stavis complies.)

DR 1-102A5.

Q. So the airs expressed by some of the members of the Committee were that even if an attorney was not associated with the defense of the case, he could be prosecuted for public statements under that particular rule. A. I wouldn't go so far as to say that it was their view that they could or should be prosecuted. I believe they expressed some doubt that a question under that situation should be looked into further.

Q. For factual or legal looking into? (93) A. Factual.

Q. Then you are asserting, are you, that the legal view of the members of the Committee was under the facts, if these statements attributed to him in the press were true,

that they could be prosecuted even if the was not a member of the defense team under that rule. A. You are asking me—

Q. I am asking you to report as to what happened at the meeting. A. You are asking me to report what the thinking of some of the members was of the Committee?

Q. Not their thinking, but what they said. A. There was an opinion that was held by some of the members of the Committee that the statements attributed in the newspapers to Mr. Hinds would have been a violation of that Disciplinary Rule if they, in fact, had been made.

Q. And even if he was not associated with the defense? A. That is correct. That opinion, however, was not, in any way, determinative of the Committee's decision to proceed with the investigation.

Q. So the Committee did not proceed upon that theory, is that correct? (94) A. I would say that was probably, although we did not take a vote, a minority view within the Committee?

Q. Can we conclude from your testimony that the action of the Committee, therefore, was not based upon that view that you asserted and described as the minority view. A. The action of the Committee was based on more restrictive questions, as to whether or not Mr. Hinds was associated with the defense team.

Q. Now, with respect to that view and the action—incidentally, when did the Committee finally take its action? A. Which action are you referring to?

Q. The action to proceed with the charges against Mr. Hinds. A. I believe that action was taken in the fall of last year when Mr. Foley was instructed to prepare a statement of charges against Mr. Hinds.

Q. Now, referring to more restrictive views as defined by you, what was the factual foundation for the Commit-

tee's conclusion of the Committee's charge that Mr. Hinds was associated with the defense? A. Statements attributed to him in the newspaper article or articles and the fact that he had represented Miss Chesimard at the time of the criminal trial in (95) an action, a civil action I believe it was, to determine whether or not the case could be heard on Fridays because of the religious beliefs of Miss Chesimard.

Q. Those two items, newspaper articles and the fact that he had represented her in a civil action in the Federal Court? A. The civil action which related to the criminal action.

Q. The civil action was in the Federal Court, is that correct? A. I believe it was, yes.

Q. Were there any other matters, other than these two items to which you have referred? A. As indicating to the Committee that Mr. Hinds was associated with the defense of the case.

Q. In the language of—I take it you are referring to associated with the defense in the language of DR 7-107D. A. I believe so, yes. I would say.

Q. Any other facts? A. I don't have a copy of Mr. Foley's report here available to me to look to see if there were other facts which he presented to the Committee. Those are the two that I recall off the top of my head.

The Court: Mr. Stavis, the action to (96) which the witness and you have referred, is that the one before Judge Barlow?

Mr. Stavis: Yes.

The Court: Then there would be a file here in Trenton?

Mr. Stavis: Yes.

William C. Moran, Jr., Esq.—for Plaintiffs—Direct

Q. Perhaps I can help you by showing you Mr. Foley's report. I call your attention to Mr. Foley's report.

Mr. Stavis: Has it been marked in evidence ?

The Court: It's been marked for identification, I think, Mr. Stavis.

Mr. Stavis: None of these have been marked in evidence yet, I take it. Can we facilitate this whole matter by offering in evidence all these six items which have heretofore been marked for identification?

The Court: Mark them in.

(Whereupon Exhibits P-1 through P-6, previously marked for identification, are hereby received in evidence.)

Q. (Continued) I call your attention to page 2 of Mr. Foley's report and ask you whether Mr. Foley doesn't clearly state that Mr. Hinds did not (97) appear as attorney in either the criminal trial before Judge Appleby or on the petition to have the case removed from the State Court to the Federal Court? A. I would have to look at the report.

Q. Well, look at that particular language and see whether I haven't quoted accurately. A. You have quoted the report accurately.

Q. Thank you. So that based upon the refreshment of your recollection from having inspected Mr. Foley's report, are you now prepared to reconsider your previous answer, namely, that you relied on newspapers as well as the fact that he appeared as counsel in a proceeding before Judge Barlow? A. I have a definite recollection of the fact that at some point in time, the Committee was told that Mr.

Hinds had represented Miss Chesimard or been associated in some way with the action before Judge Barlow on behalf of Miss Chesimard.

Q. Now, were you ever told that that case before Judge Barlow had to do with the conditions of incarceration in jail and had nothing to do with the criminal trial in Middlesex County? A. I don't believe that I was ever told that, no.

Q. Did you ever ask? A. Who?

(98) Q. Anybody.

> Mr. Moore: Your Honor, I have to object to that. I think the witness should be allowed to review the report he had a year ago in its entirety to refresh his recollection and not select bits and pieces of it.
>
> The Court: There is no objection to that.
>
> Mr. Stavis: Of course.
>
> The Court: But I would assume other things happened besides from a formal report and he is asking that.
>
> Mr. Stavis: I have no objection to the witness's reading the entire report.

A. There is nothing in Mr. Foley's report that goes to that question that I can see and if your question was before, did I ever ask anybody, the answer is no.

Q. Now, let me go back to it then. The basis upon which the Committee, acting upon its majority view as enunciated by you that there was enough to justify proceeding against Mr. Hinds as being associated with the defense was what appeared in the newspapers, and some kind of knowledge that he represented Assata Shakur in some civil proceeding in (99) Federal Court, is that correct? A. That is my recollection, yes.

William C. Moran, Jr., Esq.—for Plaintiffs—Direct

(99) Q. The precise nature of that case, whether or not it related in any way to the criminal proceeding in the Middlesex County Court, was that ever expounded before the Committee? A. I believe it was.

Q. By whom? A. Mr. Foley.

Q. And what did he say about that proceeding in the Federal Court where he represented Ms. Shakur? A. I can't recall precisely what he said.

Q. Did he say it was connected with the criminal proceeding in the Middlesex County Court? A. I don't recall.

Q. Did he say it was not connected? A. I am sure he did not say that it was not connected.

Q. Did he say that he had looked at the pleadings? A. No, sir, I don't recall whether he said that or not.

Q. In all this period of investigation, he said that there was a proceeding in which he represented her in a Federal Court, but didn't say (100) that he looked at the file. A. He did not tell me and I don't recall that he told the Committee that he had looked at the pleadings that were filed in the Federal Court proceeding.

Q. Well, his reports were to the Committee, of which you were chairman, so if he reported to the Committee, you would have certainly heard it. A. Unless it was at a meeting in which I was not present.

Q. It certainly was not at a meeting in which you were present where you heard any enunciation of that— A. No, sir, I didn't.

Q. Of what that proceeding was about and what connection, if any, it had to the criminal proceeding? A. I don't recall that I did from Mr. Foley, no.

Q. Did any member of the Committee come up with the idea, suggesting to Mr. Foley that he should look at the file? A. In the Federal Court matter?

Q. Yes. A. I don't believe that that was suggested to him, no.

Q. Now, the other thing that you said, the first item that you mentioned as being the basis for a (101) judgment that Mr. Hinds was associated with the defense was some newspaper articles, was that correct? A. Yes, sir.

Q. Now, I show you exhibits 2 and 3 which have been marked in evidence in this case and tell me if those are the newspaper articles which the Committee had in mind. A. Yes, sir.

Q. Now, will you look at the ninth paragraph, the first column of Exhibit 3 and tell me whether that was what you had in mind when you referred to a newspaper article from which you concluded that Mr. Hinds was associated with the defense. A. We never reached that conclusion, sir.

Q. Or sufficient to justify the filing of the charge. A. That was part of it.

Q. Now, would you read that particular paragraph into the record? A. "Hinds has represented Chesimard in a separate Federal suit challenging the conditions of her isolation cell confinement in the Middlesex County jail but is not a member of the five-lawyer defense team headed by William Kuntzler."

(102) Q. So that from the statement that he was not a member of the five-member defense team, headed by Mr. William Kuntzler, you concluded that he was associated with the defense.

Mr. Moore: Objection, your Honor. There is another part of that article.

Mr. Stavis: Well, that is for cross-examination.

A. No, sir.

William C. Moran, Jr., Esq.—for Plaintiffs—Direct

Q. That is not—the answer to my question is no. If the answer to my question is no, would you now look at that article and tell me what other portion of that article led you to the conclusion that he was associated with the defense? A. I can't really tell from this because this is obviously a photocopy of the article and part of it is missing.

Q. Which part is missing? A. At least a portion of the last paragraph to the right of the page.

Q. Excepting for that portion that is missing, and I respect your difficulty in that connection, would you now answer the question on the assumption that there is nothing very illuminating to this question, in respect to the question that I have asked? (103) A. The fact that Mr. Hinds has represented Miss Chesimard in a separate civil suit challenging the conditions of her isolation cell consignment in the Middlesex County jail.

Q. And that was the basis upon which you and the members of your Committee made a preliminary determination that he was associated with the defense? A. No, sir, not at all.

Q. Anything else in this newspaper article? A. There is nothing else in that newspaper article.

Q. And what about the statement in the newspaper article that he was not a member of the five-lawyer defense team headed by William Kuntzler? A. The fact that he was not a member of the five-lawyer defense team in the opinion of the Committee was not, in any way, dispositive of the issue as to whether or not he was associated with the case.

Q. Approximately ten minutes ago you answered the question as to the basis for your judgement as to whether he was associated with the defense, and you said it was based upon newspaper articles and it was based

upon knowledge as to his representing her in a Federal Court proceeding. If you recall, I asked you if there was anything else and you said no, sir, there was not. (104) A. I said, to the best of my recollection, there was not, without having reference at that point in time to Mr. Foley's report.

Q. And then you looked at Mr. Foley's report and you still did not have anything else, did you, other than the newspaper articles and the fact that he represented Assata Shakur in a Federal proceeding. Is there anything else that you had? A. I believe you didn't as that question again after I looked at Mr. Foley's report.

Q. I will ask it of you again now. A. If I could refer to the report again, because I believe you have got it.

Q. Fine. A. Yes, sir, there is the tape recording Mr. Foley obtained from the Public Broadcasting Authority, 52.

Q. And what did the tape say of Mr. Hinds' association with the defense? A. The report did not indicate that is said anything on the question of his association with the defense.

Q. So we can eliminate the tape recording. A. No, sir. You asked me on what we based the charges.

(105) Q. No, sir, I asked you what you based your judgement on, that he was associated with the defense, not what you based the charges on. A. All right. Then it would be on those two things.

Q. The newspaper articles and your knowledge that he had represented Ms. Shakur in this separate civil proceeding. A. Yes.

Q. That is all. A. Yes.

Q. Fine. And with respect to the newspaper article— A. Articles, Mr. Stavis.

William C. Moran, Jr., Esq.—for Plaintiffs—Direct

Q. —articles, we are going to go to both of them and one of them was Exhibit 3 which also included the statement that he was not part of the defense team headed by Mr. Kuntzler. you were aware of that, were you not? A. Yes.

Q. Now, let's look at Exhibit 2. Is Exhibit 2 the other newspaper article? A. Yes, sir.

Q. Is that correct? Was there a statement there that you relied upon for your judgement that he (106) was associated with the defense in the language of DR 7-107D? A. Yes.

Q. What does that mean? A. Do you want me to read it to you?

Q. Yes. A. "Before the action in Federal Court began, Lennox Hinds, an attorney, also representing Miss Chesimard, said the defense team wanted the case moved to another court because in New Brunswick, 'what we are seeing is legalized lynching.' He said he was speaking for the defense team because the members were 'gagged' by Judge Appleby whom he accused of asking prospective jurors self-serving questions which he said were leading to the 'recreation of a hanging court.'"

Q. And what made you conclude that he was—what gave you your judgement, brought you to your judgement that he was associated with the defense in the sense of DR 7-107, from that statement? A. Two things: The article refers to Lennox Hinds, an attorney also representing Miss Chesimard.

Q. But you knew that he was representing her in a civil proceeding, you knew that that is what they referred to, didn't you? (107) A. No, and I do not know to this day that that is what the reporter had in mind when he made that statement.

Q. And Mr. Foley never explained that to you. A. That

that is what the attorney had in mind when he made that statement or rather that was what the reporter had in mind when he made that statement?

Q. You never obtained a report as to exactly what it was Mr. Hinds had represented Ms. Sekur in, is that correct? A. The question that you just asked me is whether or not we ever obtained a report from Mr. Foley as to whether or not the reporter—what the reporter was thinking about when he wrote this and the answer to that question is no.

Q. Nor did you ask Mr. Foley to report. A. No, sir.

Q. So you relied on the statement by the reporter and what else? A. The fact that Mr. Hinds said he was speaking for the defense team because the members were gagged by Judge Appleby.

Q. Anything else? A. In this article, no.

(108) Q. Well, are there any other newspaper articles? A. Yes. I'm sorry. There is also something else in that article. As part of the article, there was a photograph of Mr. Hinds and the caption under the photograph says, "Lennox Hinds, one of Joanne Chesimard's lawyers, ponders an answer at a news conference in New Brunswick yesterday."

Q. Do we know, Mr. Moran, have the whole basis of yours and the Committee's judgment of that, and I want to quote, "Mr. Hinds was associated with the defense"? A. Sir, the Committee never made a judgment that Mr. Hinds was associated with the defense team. The Committee felt there was a prima facie—that there was prima facie evidence of the fact, based on these newspaper articles and Mr. Foley's report.

Q. The two newspaper articles and the fact that he represented her in a civil proceeding. A. Civil action, yes.

Q. The contents and nature of which you never ascertained, right? A. The content of which?

Q. Of that civil proceeding. A. That I personally never ascertained or the (109) Committee never ascertained?

Q. The Committee? A. The Committee ascertained it.

Q. When? A. It is indicated in Mr. Foley's report.

Q. As indicated in Mr. Foley's report? A. That is correct.

Q. And as indicated in Mr. Foley's report, it was civil litigation which pertained to her confinement in the Middlesex County jail. A. That is correct and I believe that one of the newspaper articles indicated that also.

Q. I want you to look at what has been marked as P-17 for identification in depositions. A. Yes, sir.

Q. Do you remember Mr. DiLeo reporting to you, Mr. Cowan's view of this matter? A. I do not have an independent recollection of Mr. DiLeo reporting Mr. Cowan's view as to the merits of the charges. I do recall him reporting to us Mr. Cowan's view as to the procedural requirements.

Q. But in any event, looking at Mr. Cowan's memorandum— A. That is Mr. DiLeo's memorandum.

Q. Looking at Mr. DiLeo's memorandum (110) describing his conversation with Mr. Cowan, Mr. Cowan was there expressing the minority view of the Committee. A. He was expressing the view that was held by some of the members of the Committee, yes, the minority of the Committee.

Q. But not by the majority. A. Yes, that is my recollection, it was not the majority. I think I pointed out before that there was no formal vote taken on that and that was my opinion as the chairman of the concensus.

Mr. Stavis: I would like to mark this as P-7 for identification.

The Court: Would you tell me a little more about it? Is that some communication that the secretary had with Judge Cowan at that time?

Mr. Stavis: May we mark it in evidence?
The Court: Yes.

(Whereupon letter is hereby received and marked P-7 in evidence.)

Q. Now, Mr. Foley reported to the Committee, did he not, that he had attempted to have an interview with Mr. Hinds, is that correct? A. Yes.

(111) Q. And that Mr. Hinds declined to have an interview as long as it was the Committee's position that any such interview would have to be voluntary on his part. A. No.

Q. Is that correct? A. No.

Q. Would you tell me what Mr. Foley did report? A. Mr. Foley reported to the Committee at different stages of the investigation. I believe initially, that Mr. Hinds wanted some time to obtain counsel before he would submit to an interview. Then I believe he indicated that Mr. Hinds, through counsel, wanted more time to prepare their case—rather to investigate the matter before they would submit to an interview and then, finally, that Mr. Hinds, through counsel, indicated that he wanted something more specific by way of what the charges were against Mr. Hinds before he would submit to an interview voluntarily. I don't recall any report by Mr. Foley along the lines that you phrased it.

Q. Would you look at the letter you wrote to me under date of July 1, 1977 and I ask you if that doesn't refresh your recollection on this entire (112) matter. A. Refreshes my recollection on what entire matter, Mr. Stavis?

Q. On the question as to whether or not the Committee's view was that Mr. Hinds was obligated to confer with Mr. Foley and what action it would take if he chose not to

confer with Mr. Foley. A. It refreshes my recollection on that point, yes.

Q. The Committee's view, was it not, it was a purely voluntary question on Mr. Hinds' part as to whether or not he chose to be interviewed by Mr. Foley? A. No, sir.

Q. Do you have any power of compulsion? A. At that stage of the game, no.

Q. That is all we are talking about, at that stage of the game. A. No.

Q. Then it was a voluntary matter with Mr. Hinds at that time. You said at this stage of the game. I'm sure you didn't view this as a game. A. No.

Q. At this stage of the proceeding, shall we say? (113) A. That is correct.

Q. All right. A. I have a recollection, and I would have to double-check my reference to the rules, but there is an obligation on the part of an attorney to cooperate with an investigation by an ethics committee. I couldn't state for certain whether or not there is such a rule unless I looked it up but that is what my independent recollection is.

Q. Would you read the last paragraph of the first page of that letter and after you have read it, tell me whether you did recognize that the question of interview with Mr. Foley was purely a matter of volition on the part of Mr. Hinds? A. We were looking—there is no doubt that we were looking for Mr. Hinds' voluntary cooperation in this matter.

Q. And you did not ascertain, did you, that he had any legal duty to speak to Mr. Foley? A. No, sir, we did not.

Q. And nor do you know of any legal duty that he did have? A. I cannot state with certainty that there is such a legal duty and, in fact, there is no doubt that Mr. Hinds has certain constitutional privileges which he could

have asserted in refusing to discuss the (114) matter with the Committee.

Q. This is a copy of that letter, is it not?

The Court: While he is going over that, let's take a short recess.

(Whereupon above letter is hereby received and marked P-8 in evidence.)

(Whereupon a short recess is taken.)

Q. Mr. Moran, I would like to show you Plaintiff's Exhibit 5 in evidence and that is Mr. Foley's report and refer you to page 4 in the sentence which begins on the next to the last line. Will you read that sentence? A. "Mr. Hinds represented himself to be a member of and a spokesman for the Chesimard defense team."

Q. Do you know any place where Mr. Hinds represented himself to be a member of the Chesimard defense team? A. I only know what I saw in the newspaper articles that referred to Mr. Hinds as Ms. Chesimard's attorney or one of her attorneys.

Q. I understand that but do you know of any place where Mr. Hinds ever identified himself as a member of the defense team? A. Using that specific language?

(115) Q. Well, the language employed by Mr. Foley. A. Mr. Foley referred to him as a member of and a spokesman for.

Q. I understand that but that means a member of the defense team and a spokesman for the defense team and I am asking you now whether you know of any place where Mr. Hinds ever identified himself as a member of the defense team. A. In that precise language, no, I do not.

William C. Moran, Jr., Esq.—for Plaintiffs—Direct

Q. And did Mr. Foley indicate that he had any support for that statement? A. I would have to look at the report again.

Q. There is the report and you might wish to look at the newspaper articles. A. I don't want to get into an argument with you, Mr. Stavis, on the question of semantics.

Q. That is not what this exercise is about. All I want is an answer to my question. A. There is—I think the position could be made or Mr. Foley could take the position that there is information in his report in which he might make the statement that he was a member of the defense team.

Q. What was that? A. He was speaking for the defense team because (116) its members were gagged by Judge Theodore Appleby.

(116) Q. So that when Mr. Foley said, Mr. Hinds represented himself to be a member of and a spokesman for the Chesimard defense team, then you take it that is sustained by the statement to which you just referred? A. Whether or not it is sustained or not is something that we could debate all afternoon.

Q. No, no, I am sure not. A. All I am stating is that I think there are other things in Mr. Foley's report that could possibly have led him to make that statement.

Q. But you didn't believe that, did you? A. That he was a member of the defense team?

Q. Yes. A. My knowledge was that he was and if you define a member of the defense team, the people that come into court every day and try the case, I knew he was not.

Q. Now, that was well understood by the entire committee? A. That he was not trying the case for Miss Chesimard? Yes.

William C. Moran, Jr., Esq.—for Plaintiffs—Direct

Q. Now, you and Mr. DiLeo designated Mr. Foley to do this investigation, in other words, after (117) I pointed out to you Mr. Foley requested doing this investigation, is that correct? A. As I recall, that designation happened at one of the meetings, either in January or February of '77 when the whole matter was first called to the attention of the Committee which is the way it is usually handled when a member of the Committee brings a possible ethics violation to the attention of the Committee as opposed to the other route where a private complaint is filed by an aggrieved party, in which event, Mr. DiLeo would make the appointment automatically without having the matter first called to the attention of the Committee.

Q. But it was called to the attention of the Committee and the Committee agreed to appoint Mr. Foley. A. That's right. Actually, the Committee agreed with Mr. DiLeo's appointment of Mr. Foley.

Q. Did it occur to you or any member of the Committee that there might be some question as to whether you appoint, as an investigator of charges, the very person who made the charges? A. There were no charges made against Mr. Hinds.

Q. Or the very complaint or issue that was raised. Did it occur to you that there was any (118) question to you about that at all? A. That the person that raised the issue should be assigned to investigate it? No, I didn't see any problem with that.

Q. Was he expressing anything different from what he had expressed in January by his first letter on this matter? A. I would like to see Exhibit 1.

(Mr. Stavis complies.)

I believe there may have been a difference in approach, but the result was the same.

William C. Moran, Jr., Esq.—for Plaintiffs—Direct

Q. So after approximately 11 months of investigation by the man who originally raised the issue, he comes out with a report which substantially is the same as the issue he raised before. A. Except that it wasn't after 11 months of investigation. There was an 11-month time period but there was not an investigation going on during that entire period of time.

Q. Now, of course, the one thing this Committee never obtained, Mr. Foley never obtained, was any voluntary statement from Mr. Hinds. A. That is correct.

Q. And did you, in response to a question that I asked you in depositions, say, "If Mr. Hinds (119) had appeared before Mr. Foley and satisfied Mr. Foley to the extent that Mr. Foley also satisfied the Committee as a whole, because Mr. Foley is not the sole determinant as to whether the statement of charges is to be filed that there was not a violation of the Disciplinary Rules, then no charges would have been filed." A. I said that, yes.

Q. So that in our view, it was up to Mr. Hinds to come forward and present the facts to Mr. Foley and satisfy Mr. Foley and the Committee that charges should not be filed. A. No, sir.

Q. Would you look at that statement again and tell me whether you still want to answer that question no. A. I said that if Mr. Hinds had appeared before Mr. Foley and satisfied him and through him, the Committee, that there was no violation of the Disciplinary Rules, then there would have been no statement of charges.

Q. And absent Mr. Hinds' coming forward, you were prepared to proceed on what you have testified before you? A. We were prepared to proceed on the evidence (120) available to us.

Q. And we have gone through completely what that evidence is. I don't think we have to repeat that. A.

That is correct but the way you phrased your question, it implied that Mr. Hinds had the burden initially of satisfying the Committee that he had not violated a Disciplinary Regulation and I don't mean to state that for one instant.

Q. Well, that may be a question the Judge would want to think about as to whether or not that is what your proceedings may have in fact amounted to.

The Court: Now, wait a minute. I have already decided, have I not, that there could be a violation based on what I have. I think I have decided that. Now, this is directed toward whether or not the Committee was biased.

Mr. Stavis: That's right and whether or not what this is directed at, your Honor, given now what you now know the Committee had before it and I think it is much clearer from this record what the Committee had before it than it ever was before.

(121) The Court: And you are asking me also to reconsider that portion which I decided in that opinion.

Mr. Stavis: Yes, and that whether the Committee, on that basis, could say, now, you have the burden of disproving it. Now, I think this is the first time the record is entirely clear as to just what the Committee had.

The Court: There wasn't anything except the Rules and the charges that I had in the first instance.

Mr. Stavis: That's right. You didn't have a record. That is why it has been so important to get a record for you.

The Court: Okay.

William C. Moran, Jr., Esq.—for Plaintiffs—Cross

Mr. Stavis: No further questions.
The Court: Mr. Moore.

Cross-examination by Mr. Moore:

Q. Mr. Moran, did Judge Appleby, at any time, in any manner whatsoever, contact you or the Committee to encourage you or the Committee or pressure you or the Committee to file charges against Mr. Hinds? (122) A. No.

Q. Did Mr. Barone or anyone in the Prosecutor's Office, at any time, contact you or the Committee to pressure you or the Committee to bring charges against Mr. Hinds? A. I don't know Mr. Barone and nobody else in the Prosecutor's Office ever contacted me.

Q. Has anyone, at any time, pressured you or the Committee or encouraged the Committee or you to bring charges against Mr. Hinds in this matter? A. No.

The Court: Let me maybe simplify this. Has anyone contacted the Committee in regard to this matter except in regard to the official capacity, that is, the man investigating it, who he contacted and so forth?

The Witness: The Committee got a lot of contact from people on behalf of Mr. Hinds, but nobody, to my knowledge, contacted the Committee from outside the Committee to urge us to take any action on it against Mr. Hinds.

Mr. Moore: Thank you. That's all I have.
The Court: Anything else, Mr. Stavis?
Mr. Stavis: No, sir.

Michael A. Cohan, Esq.—for Plaintiffs—Direct

Testimony of Michael A. Cohan, called as a witness for the Plaintiffs.

(123) MICHAEL A. COHAN, having first been duly sworn, testifies as follows:

Direct examination by Mr. Freamon:

Q. Mr. Cohan, you are an attorney at law in the State of New Jersey, are you not? A. Yes.

Q. And currently chairman of the Ethics Committee. A. Yes.

Q. And that is the Middlesex County Ethics Committee? A. Yes.

Q. How long have you been chairman? A. Since January 1 of this year.

Q. Now, I notice you brought some documents with you. Could you tell us, please, what you have with you on the witness stand? A. A copy of the report of the Committee which was handed to me this morning, I have your subpoena and my files which consist of the one letter which you (124) were shown and which had already been marked as an exhibit at the depositions. It is my letter of March 28, 1978 to Mr. Cowan. The exact same items I had with me at the depositions where I was deposed in this matter.

The Court: Could I interrupt a moment? I take it the proceeding against Mr. Hinds is now, as it stands, still pending.

The Witness: Yes, sir. Nothing has been done since the statement of charges has been filed.

The Court: All right.

Michael A. Cohan, Esq.—for Plaintiffs—Direct

Q. Now, Mr. Cohan, you recall most of the discussions or were you present when most of the discussion concerning this particular matter were discussed at the meetings of the Ethics Committee during 1977? A. I don't know what you mean by most of the discussions. I was present most of the monthly meetings of the Ethics Committee in '77.

Q. And at least three or four of those monthly meetings, the Lennox Hinds matter was discussed? A. I don't recall how many meetings it was discussed specifically. I know it was discussed more (125) than once and possibly two or three and it could have been more.

Q. Now, do you recall a discussion whether or not a statement of charges was filed? A. Yes.

Q. About when was that discussion? A. I don't remember.

Q. Would it have been in the spring, summer, fall? A. Without looking at the minutes of the various meetings, I honestly don't remember at which meeting it was discussed.

The Court: Was it during 1977?
The Witness: Yes, sir.

Q. Now, you remember the discussion. A. I remember the discussions about whether or not a statement of charges should be filed.

Q. Now, based on your recollection of those discussions, can you tell me, and can you tell the Court, please, what your recollection is concerning why the decision was made to file the charges? A. It was my recollection that the intial issue was raised by Mr. Foley. I don't recall whether the newspaper articles were actually circulated by mail or whether they were circulated around the table at (126)

the monthly meeting but that the articles were discussed, what was said had been discussed and the issue as to whether or not Mr. Hinds was a member of the Chesimard defense team was discussed; that based upon those articles and what appeared to be a prima facie case of a problem that Mr. Hinds might have had, that unless there was some response to either refute that he had made the statement or to show that he was not a member of the defense team, without some response, there was a prima facie case and that the charges should be filed.

Q. So then the decision to file the charge was in part designed to get a response from Mr. Hinds, isn't that true? A. No, it was that without a response from Mr. Hinds there was a prima facie case and it would appear as though there was a violation. Whether or not there was a response from him personally or response by way of an answer to the statement of charges or something, without a response, it appeared as though there was a violation.

Q. Well, have you had the opportunity to go over your prior testimony in this case by way of deposition? A. I looked at that this morning, yes.

(127) Q. Okay. I refer you to page 24, line 13, and I asked you this question: "Now, do you recall then what the decision of the Committee was after the discussion, the discussion we spoke about concerning whether or not there was a violation? Do you recall what the decision of the Committee was after that discussion," and do you recall giving this answer: "I think the ultimate decision was that we had no choice but to file a statement of charges in order to get some sort of a response."

Is that what you said? A. Yes, sir, that is what you just said.

Q. Didn't I just hear you say that it was—the reason the charges were made was because there was a prima facie case? A. Yeah, that we had no choice based upon the posture of the case at that point, but to file a statement of charges and to get some kind of response.

Q. To get a response. A. Yeah, or else he was going to be found guilty of the charges. If he responded, my own personal opinion was there was a very good chance that the charges would have been dismissed without even a statement of charges.

Q. Why did you have that opinion? (128) A. Because it depended on whether or not he said the statements and whether or not he was a member of the defense team and whether or not there was anything beyond this prima facie case and, if, in fact, there was a defense to what the prima facie case looked like, there may never have been a statement to charges filed.

Q. But you are aware of the fact that he is not compelled or not obligated to appear. A. Absolutely.

Q. And aren't you also aware of the fact that the investigating member has, at his disposal, many tools which would enable him to investigate the facts that are brought to the Committee's attention? Isn't that true? A. I cannot accept that. I don't know what you mean by many tools.

Q. Well, he has the ability to interview witnesses. A. Which he did.

Q. He has the ability to check court papers and files, is that correct? A. If that is relevant.

Q. He has the ability to read the newspapers and he did, in this case, is that right, read what is (129) said in the newspapers about the case? A. Absolutely.

Q. The Committee even has some subpoena power, isn't that true? A. No, that is not true at that stage of the

proceeding. That is only true after the statement of charges has been filed and there has been an actual hearing. Then we have the power of subpoena.

Q. But you will admit though that part of the decision or at least, as you said in the deposition, the ultimate decision was that we had no choice but to file the statement of charges in order to get a response. That was part of your decision, wasn't it? A. I don't know what you mean by part of our decision. When I said that we had no choice but to file the statement of charges, that was based upon the fact that based upon the evidence we had, there was definitely a prima facie case of charges and that without some kind of response, there was a violation. That was what my understanding of the decision of the Committee was.

Q. Now, do you recognize—

Mr. Stavis: May I have this marked? It is minutes of the meeting.

(130) (Whereupon minutes are hereby received and marked P-9 for identification.)

Q. Now, do you recall when the decision to file the statement of charges was made? A. No.

Q. I will show you the minutes and ask you, the minutes of the Ethics Committee for the year 1977—I withdraw that.

Mr. Foley's report was not filed until December, is that right? A. I don't recall ever seeing Mr. Foley's report until this morning.

Q. This morning? A. I wasn't at the December meeting. I recall specifically because the December meeting is a little bit different since it is a Christmas meeting and I know I missed it last year.

The Court: I get a clear inference off of that, Mr. Cohan.

The Witness: I have to pay for it. Mr. Moran paid for it last year.

Q. So the written report was not filed until after. A. I don't know when the written report was filed.

Q. Well, I will show you. (131) A. I know it is dated December, 1977. I just, personally, was not the chairman then and I just don't know when it was filed.

Q. Well, it was tendered to the Committee in December, 1977. A. I only gather that from the date on the report. I wasn't there in December of '77.

Q. Now, you had occasion to discuss this matter with Mr. Foley all during the course of his investigation, didn't you? A. Me, personally, discuss it with Mr. Foley?

Q. Yes. A. I don't recall ever discussing it with Mr. Foley other than the Ethics monthly meetings as a part of the general discussion.

Q. Well, you have known Mr. Foley for some time, is that right? A. That is correct.

Q. For how long? A. Since we were about five or six years old.

Q. You grew up together? A. I don't know what you mean by grew up together. We lived on the same street, we went to different schools and we played baseball together after school.

Q. Now, did there come a time, Mr. Cohan, (132) when you received some letters in reference to this case to the Ethics Committee? A. After I was chairman of the Committee?

Q. After you were chairman. A. Yes.

Q. Had the Committee received, in addition to the letters that I just spoke about, had the Committee received any correspondence with reference to the charges pend-

ing against Mr. Hinds or the investigation? A. I don't recall the Committee received other correspondence. I know there was other correspondence sent to, I believe, Mr. Moran, I believe Mr. DiLeo and I believe Mr. Foley.

Q. Mr. Moran, in his capacity as chairman, I would assume. A. Yes.

Q. Mr. DiLeo, in his capacity as secretary. A. Yes.

Q. And Mr. Foley, in his capacity as investigating member of the Committee? A. Yes. I don't know if the Committee, as a whole, got any correspondence. I do know those three people did, in addition to myself.

Q. Now, did you ever have a chance to view (133) the correspondence, some of the correspondence that came into Mr. Moran or to Mr. DiLeo? A. Truthfuliy, I looked at it.

Q. You looked at it? A. I certainly did not bother to read all of the letters that I got.

Q. Can you say about how many letters came? A. I think one batch contained about 75. I don't think there was any other batch that had quite that many.

Q. Well, members of the Committee that I talked about, they received letters from lawyers concerning the charges and the investigation, right? A. I don't understand your question. What do you mean, members of the Committee, are you talking about?

Q. Did Mr. Moran or Mr. Foley or Mr. DiLeo ever receive letters from any lawyers expressing opinions concerning this case, whether or not the case ought to go ahead or not go ahead, if you know? A. I would have to look to see whether or not any of the letters that they got were specifically from lawyers. I know they got letters. I know that the letters expressed opinions that they should not (134) go ahead with the case. I know—I just don't know who got letters from lawyers or lay people

or students or whatever. I just can't recall specifically who got what.

Q. Well, you know that letters came from citizens. A. I assume lawyers are citizens.

Q. Letters came from citizens expressing their opinion about the case. A. Absolutely.

Q. All during the course of the investigation, is that right? A. I don't know about all during the course of the investigation. My recollection is that that was not until after the statement of charges was filed.

Q. Well, even after the statement of charges were filed, there were letters from people, citizens? A. I don't recall any letters before.

Q. Well, after the statement of charges were filed, didn't letters come from persons and citizens expressing the view that the case ought to be stopped? A. Absolutely.

(135) Q. Now, there were quite a few letters, weren't there? A. I have already indicated that.

Q. Now, there were also letters from organizations, weren't there? A. I don't really recall seeing any specifically from organizations. The ones that I got, I am pretty sure, were from individuals.

Q. From individuals? A. There may have been some from organizations, too, or from individuals on organization letterhead. I really don't recall, specifically.

Q. Now, sometime in March, you got 75 letters from law students, right? A. I got 75 letters sometime in March that I thought were from law students, right.

Q. Apparently from law students. A. Apparently.

Mr. Stavis: May I have this marked?

(Whereupon letter is hereby received and marked P-10 for identification.)

Michael A. Cohan, Esq.—for Plaintiffs—Direct

Q. I show you what has been marked P-10 for identification. Please tell the Court what that is. A. P-10 is the letter or a copy of a letter I (136) referred to earlier which I wrote as chairman of the Committee to Mr. Cowan, in this matter in which I disclosed approximately 75 form letters sent by Rutgers law students to Mr. Foley. Apparently, these letters were not sent to me but to Mr. Foley and forwarded to me.

Q. Now, who is Mr. Cowan? Who was he at that time? A. The letter reads to Robert E. Cowan, Esquire, Assistant Director, Administrative Office of the Courts.

Q. Now, the Administrative Office of the Courts runs the central ethics unit in this state, is that right?

> The Court: I can take judicial notice. I think Mr. Cowan at that time ran that branch of the Administrative Office; that is, the Ethics and Grievance.
>
> Mr. Freamon: Thank you, Judge.

Q. Now, isn't it a fact, Mr. Cowan, that in that letter, you indicated to Mr. Cowan that you thought that the forwarding of 75 letters from law students on behalf of Mr. Hinds was sufficient to file another charge against Mr. Hinds? Isn't that so? (137) A. No, I thought it was sufficient to initiate an investigation of the circumstances under which the letters were written and that is exactly what I indicated, was that, my words were that in an attempt to intimidate a member of the Committee, it may very well constitute a new charge.

Q. So it was your view that the receipt of 75 letters from law students about this case was an attempt to intimidate the Committee. A. Well, the letters that we got were totally without factual basis and in that, they refer

to certain things that were allegedly being done that were not being done under the Rules pertaining to Ethics Committee matters. I was totally barred from commenting, from replying in any way, shape or form, to any of the letters. We were not allowed to state or to tell anyone that the factual basis on which these persons who had obviously been misinformed were trying to get us to drop this and that, combined with the fact that we were continuing to get letters from organizations or other people whereas I said, I don't recall that I did, we felt was an attempt to intimidate us into dropping these charges. This is after the statement of charges had been filed.

Q. Now, what evidence did you have though (138) that Mr. Hinds was in any way connected with the alleged attempt to intimidate? A. None whatsoever. The only evidence that we had—

Q. You have answered my question. Now, wait, I have another question. A. I haven't finished my answer. I think I am allowed to answer in full, Judge.

The Court: Go ahead.

A. (Continued) The letters were written in an attempt to get us to drop the proceedings that were going on at that point against Mr. Hinds. What I indicated is that there was no way that any one member of the Committee had the time or the wherewithal to investigate the circumstances behind the sending of these letters and I indicated that should be taken over by the Central Ethics Committee and that they should attempt to find out the circumstances under which the letters were being sent; that if, in fact, Mr. Hinds had anything to do with the sending of the letters, that that, in my words, may very well constitute a charge against Mr. Hinds.

Q. But isn't it fair to say that in addition to the 75 letters that the members of the Committee received, at least 75 letters from other (139) persons arrived? A. I have no idea how many other letters they got.

Q. Did the Committee make any attempt to investigate the circumstances under which any of the other letters had been forwarded to the Committee, any of the other letters by organizations or citizens or lawyers expressing opinions in this case? A. I don't think that the Committee ever did that. I think all of those letters were sent to Mr. Cowan.

Q. Do you have any correspondence or is there anything in the record that would show that all of those letters were sent to Mr. Cowan? A. The only letter that I have is the one that you have in front of you.

Q. And the only letters that you sent to Mr. Cowan were the 75 form letters. A. Those are the only ones I personally sent. The others, I understood, had been sent by either Mr. Moran or DiLeo or Mr. Foley.

Q. You say you thought but you don't know whether they were sent or not. A. I have no personal knowledge, no.

Q. And while chairman have you, since the (140) date of this letter, sent any other letters to Mr. Cowan? A. I also told you, Mr. Freamon, that that is the only time I sent letters to Mr. Cowan.

Q. Isn't it fair to say that other letters were received in 1978 besides the 75 form letters? A. By me?

Q. By you or the Committee. A. Which do you want me to answer?

Q. Either. A. By me, no, because any that I got, I would have sent to Mr. Cowan. By any other member of the Committee, I don't know.

Michael A. Cohan, Esq.—for Plaintiffs—Direct

Q. Now, I would like to ask you again, what facts did you have that would, in any way, indicate that Mr. Hinds was connected with this particular mailing of form letters? You had no facts, did you? A. I do not know at this point. I did not bother to waste time photostating or keeping copies of the letters.

Q. It would have been a waste of time? A. Yes. I didn't see the need to photostat the letters. I sent them to Mr. Cowan. I wasn't going to waste my time and money to photostat them to keep (141) a copy. I sent them to Mr. Cowan. If I could look at the letters themselves, I might be able to tell you.

Q. You didn't make any photocopies of the letters? A. I don't have copies of the letters.

Q. But on the date you wrote that letter or just prior, from the time you received it until the time that you sent this letter on March 28, 1978, isn't it fair to say that you had no evidence, you had no evidence that would establish any connection between Mr. Hinds and the sending of these letters? Isn't that right? A. That is absolutely not true.

Mr. Moore: Objection, your Honor.
The Court: He said absolutely not true.

A. I mean, you know, I just don't know what you call evidence or what I call evidence. At that point, we had the matter involving Mr. Hinds, period. Everything that was being done was an attempt to get us to stop whatever was going on at that point, including my house getting picketted. I had no idea and I didn't think that Mr. Hinds personally had anything to do with (142) the picketing of my house but it had something to do with this entire matter. That was the only reason. My children

came home and there was a poster on the door that said, "Give Lennox Hinds freedom of speech." I don't really think that Mr. Hinds put the poster on the door. I didn't have the time, the money or the expense to investigate it so I turned it all over to Mr. Cowan and I said, you investigate it because if Mr. Hinds did any of this I think that is a violation.

Q. Well, the entire paragraph of your letter, don't you say that though, do you, to Mr. Cowan? A. I don't say what?

Q. You don't say what you just said. In the third paragraph of your letter, you say, "Mr. Foley and I both feel that this attempt to intimidate a member of the Committee may very well constitute a new charge against Mr. Hinds." A. Right.

Q. "His complaint is obviously with the system itself, rather than our Committee, and, accordingly, it is my feeling that the investigation should be continued by your office." A. Right.

Q. But you didn't have any evidence that (143) Mr. Hinds had any connection with these letters at all at the time you wrote that letter, did you? A. That is your opintion, Mr. Freamon.

Q. I am asking you a question. A. No, you are not. Your opinion is that that was no evidence; that the fact that the matter involved Mr. Hinds, that the fact that there was an attempt to get the matter dropped against Mr. Hinds, that the fact that all these other things took place, you are saying, in your mind, that is no evidence that Mr. Hinds had anything to do with that. Ultimately, that is what Mr. Cowan was being asked to decide.

Q. I am asking you whether you had any evidence of that. A. The 75 letters, the numerous other letters.

Michael A. Cohan, Esq.—for Plaintiffs—Direct

Q. How would 75 letters be evidence that Mr. Hinds—75 letters from law students, organizations and other persons be evidence that Mr. Hinds is attempting to intimidate the Committee? What would you make that assumption? A. If you would like to know how that could possibly be evidence, and if you understand what evidence is, then you take those documents and you go the various people that wrote those documents and you ask them the circumstances under which they wrote (144) those documents and if, in fact, those people said, I was at a class or I was at a meeting or I was some place and I was asked by Mr. Hinds or Mr. Freamon or Mr. Stavis or anybody else, this is all evidence. Whether or not any of it is conclusive, whether or not any of it is sole evidence or the entire evidence, that is a totally different matter but it is certainly, the letters themselves are certainly evidence.

Q. Now, the letters themselves are evidence that people in the community are interested about what happens to Lennox Hinds, right? A. That is your opinion.

Q. Now, I am asking you. A. I don't know what they are evidence of. They are evidence. In order to determine exactly what they are evidence of, you have got to investigate further.

Q. Well, are the letters, would you say—you said in your letter that the letters are evidence or apparently is an attempt to intimidate a member of the Committee which may very well constitute a new charge against Mr. Hinds. A. Yes.

Q. But you had no knowledge of any facts that would link Mr. Hinds to the sending of those letters, did you? (145) A. At that point?

Q. Yes. A. Not other than the fact that they were letters in an attempt to drop charges that had been made against him.

Michael A. Cohan, Esq.—for Plaintiffs—Cross

Q. All right. So then, the fact is that you were somewhat predisposed at that time to either continue investigating or make a new charge against Mr. Hinds because of this case, isn't that so? A. No.

Q. Well, it certainly appears—

The Court: Ultimately, I have got to find facts here. I am sure what you are telling me is that you considered that these letters as evidence or an indication that someone was interested in getting these charges dropped.

The Witness: Yes, sir. They were form letters.

The Court: But you had no knowledge that Mr. Hinds was behind those letters and that you simply wanted them investigated.

The Witness: Yes, sir, absolutely.

The Court: And if he was connected, that it might constitute another charge.

The Witness: Yes, sir, that is exactly (146) what I said and what I felt at the time.

Mr. Freamon: That is all I have.

The Court: Mr. Moore?

Cross-examination by Mr. Moore:

Q. Mr. Cohan, has anyone ever contacted you or the Committee to encourage you or to pressure you to file charges against Mr. Hinds in this matter? A. No, sir.

The Court: Including judges, lawyers, prosecutors or anybody, anybody at all?

The Witness: No one.

The Court: No one, all right.

[Certification omitted in printing.]

Lennox Hinds, Esq.--for Plaintiffs—Direct

October 2, 1979
Trenton, New Jersey

BEFORE:

CLARKSON F. FISHER
United States District Court Judge

Appearances:

MORTON STAVIS, Esquire
and
BERNARD K. FREAMON, Esquire
Co-Counsel for Plaintiffs.

JOHN J. DEGNAN, Attorney General
By: STACEY L. MOORE, JR., Assistant Attorney General,
For Defendant Middlesex County Ethics Committee.
SPAGNOLI & THURING, Esquires,
By: RICHARD M. THURING, Esquire
For Defendant Edward J. Barone.

Testimony of Lennox Hinds, called as a witness for the Plaintiffs.

(3) LENNOX HINDS, having first been duly sworn, testifies as follows:

Direct examination by Mr. Stavis:

Q. Mr. Hinds, are you a member of the Bar of the State of New Jersey? A. Yes.

Q. Where did you obtain your education? A. Trinidad, West Indies, the elementary, and the secondary schools and then I went to undergraduate school at City College

of New York and did graduate work at the University of Minnesota and at Rutgers University and after that I went to law school at Rutgers University.

Q. And when did you graduate from law school? A. 1972.

Q. Did you have an occupation before you (4) became a lawyer? A. Yes, I was a research scientist.

Q. What field of science? A. Petrochemical research and also biochemical research prior to that.

Q. And following your graduation from Rutgers Law School were you admitted to the Bar? A. Yes.

Q. In what year? A. 1973.

Q. And what work did you do following your admission to the Bar? A. I worked first as director of a prison project for the American Civil Liberties Union and then I assumed a position of Associate Director of the National Conference of Black Lawyers, I did that for about one year, and then I worked for five years as National Director of the National Conference of Black Lawyers.

Q. And when did you terminate that directorship? A. I terminated that directorship August 30, 1978.

Q. Could you describe the National Conference of Black Lawyers? A. It is an organization, Bar Association, if (5) you may, comprising of about 1,000 or so black lawyers throughout the United States, Canada and the Virgin Islands and it is affiliated with or has an affiliation with the Black American Law Students Association, comprising of some four to five thousand black law students across the United States. The organization has one of its primary purposes and missions is to seek out and eradicate racism throughout the United States in all of its forms and also to encourage law students, black law students, to practice law, to defend the poor and depressed minorities within the United States and to speak out on behalf of

those who have been victims of racial discrimination in the United States. Those are the general purposes of the organization.

Q. What are the duties of the Director of that organization?

Mr. Moore: I have to object at this point. Granted, this is an evidentiary hearing on the basis of plaintiff's representation that they had evidence of bad faith on the part of the Ethics Committee to bring these charges. All this information is very interesting but has nothing whatsoever to do with the issue of bad faith, so I would object on the basis (6) of relevancy.

The Court: Well, Mr. Hinds is facing some sort of action by the Bar Association and simply to have him sit here and testify directly about that leaves sort of a vacuum in my trying to decide this case. I am going to give you leeway there.

Mr. Stavis: Thank you very much.

Would you read the question, please.

(Whereupon the pending question is read back by the reporter.)

A. Among the duties of the Director of the organization is to be the chief spokesperson for the organization in addressing the issues that organization has been organized around and I testified to previously, to attend or to call press conferences across the United States with respect to various judicial proceedings, to monitor those proceedings and to speak out at press conferences and at other public assemblies with respect to those issues, to present testimony before State and Federal legislative bodies with

respect to either pending legisation or present legislation as they impact on, again, minorities and instances to represent or to act as counsel in the representation of particular individuals in their (7) attempts to obtain relief in the Federal and State courts on racial charges.

Q. Did you have any association with the Assata Shakur case? A. Yes, I did.

Q. What was your contact with that case? A. I represented Miss Shakur in several matters that were brought before the Federal courts. It involved conditions of her confinement after she was arrested and while she was a pretrial detainee. There were matters that were before this particular court, before Judge Fisher, there were matters that were litigated before Judge Barlow who is deceased now, there were matters that were taken up on appeal to the Third Circuit but I was intricately involved in the Federal litigation, in Federal courts concerning conditions of confinement and treatment while in prison as a pretrial detainee. That was my involvement.

Q. Did you represent her in the criminal proceedings brought against her by the State of New Jersey? A. No.

Q. In any way, did you represent her in those proceedings? A. No, not at all. I never entered any appearance (8) and didn't represent her at all.

Q. Now, certain charges are made against you in connection with a press conference which was conducted on January 20, 1977. Did you conduct such a press conference? A. Yes, I conducted and participated in a press conference which occurred at my office on Bayard Street in New Brunswick, New Jersey.

Q. And can you tell us in what capacity you had that press conference? A. I called a press conference in my capacity as Director of the National Conference of Black Lawyers and I addressed members of the press there with respect to some issues involving the Shakur case.

Lennox Hinds, Esq.—for Plaintiffs—Direct

Q. Now, you have seen certain language that was attributed to you that you employed at the press conference and some of which is referred to is the charges which were made against you. Is the language which has been attributed accurate and correct as far as you know? A. Well, as I recall the language, counsel, let me just rephrase the aspect of the language that I agreed that I in fact made. I said that the Judge, in my opinion, should recuse himself for the following (9) reasons: Because he lacked the judicial temperament, the way he was conducting the trial and racial sensitivity to be impartial. I made those statements and I believe that the record and the transcripts of the trial speak for themselves. I also said that the way he was conducting the voir dire or that aspect of the proceedings would result in kind of recall and by that meaning of the term it is Webster's definition of it by which I was referring. I was quoted as saying I was speaking for the defense. I disagree with that particular statement to the extent those are the allegations that are made. What I did say was that I was speaking for the defendant who was on trial just as I spoke on her behalf a few weeks ago in Geneva before the United National Subcommission on the Prevention of Discrimination and I have spoken on behalf of other defendants in my capacity as Director of the Conference of Black Lawyers. I never said I was speaking for the defense.

Q. Were you, in fact, speaking for the defense or defense lawyers? A. The defense lawyers were there or some defense lawyers were there and they made some comments but I, in fact, had called the press conference in my capacity as Director of the National Conference of Black (10) Lawyers. I was not speaking, nor was I authorized to speak for the defense. By defense, I assume, and I again am not sure, by defense I assume

is meant in the charges, the defense lawyers but I am not really sure what is meant there by that, by the allegations. I just wanted to make a correction with respect to what my intentions were, speaking for the defendant.

Q. Excuse me just a moment, please.

Mr. Hinds, for the benefit of the Court, could you give us the names of some of the other defendants on behalf of whom you have spoken, either in the United States or in international countries? A. I have spoken on behalf of Joann Little, who was charged with murder, the killing of a prison guard in North Carolina and was on trial around 1975; I have spoken on behalf of the Reverend Ben Shavers in Wilmington, Tennessee, who is imprisoned right now in Raleigh, North Carolina; I have spoken on behalf of Mario Bedalli (phonetic), Republic of New Africa, who is imprisoned right now in Fort Leavenworth, Kansas; I have spoken on behalf of Angela Davis when she was in prison; I have spoken on behalf of Russell Means of the American Indian Movement, who is imprisoned in South Dakota as a result of a Wounded Knee situation; (11) I have spoken on behalf of Puerto Rican nationalists who were just released after spending 25 to 27 years in federal prison. Would you like me to go on?

Q. Did you ever get around to speaking about George Merritt? A. I have spoken about George Merritt and Dell Maddon, who are imprisoned serving life sentences in New Jersey, resulting from the death of a policeman following the rebellions and riots in Plainfield around 1967.

Q. Now, Mr. Hinds, when you refer to the fact that you have spoken on behalf of these people, is this consistent with any policies defined by the Board of Na-

tional Conference of Black Lawyers or did you act individually? A. No, this is a mandate, a mandate that has been promulgated by the Board of Directors of the organization and which requires that as part of my duties and responsibilities as a National Director, to speak out in a candid and open way with respect to certain cases that exemplifies some aspects of discrimination or racial intolerance in the judicial process. It might be an issue involving bail, it might be an issue involving arrests, it might be an issue involving parole, it might be an issue involving the conduct of (12) the trial, it might be the totality of those but I was mandated as my predecessor was mandated, as my successor has been mandated to speak out on those issues and, in fact, one of the conditions accepting the position is being prepared to speak out vociferously on those questions.

Q. And was it pursuant to that mandate that you held the press conference on January 20 of 1977? A. That is correct.

Q. And made the statements that were attributed to you? A. That's correct, and after making that statement, I reported to the Board with respect to all of the actions that have been taken by the Bar Association and so on.

Mr. Stavis: Thank you very much. Your witness.

The Court: May I just ask a question before you start?

Mr. Hinds, I don't have to, as you know, decide whether or not those remarks were proper or improper. I just want to get from you, if I can, as to whether or not your previous representation of Miss Shakur was simultaneous (13) or what-

ever, that you felt or did you take into account that that representation might be, how should I put it, might roll over into your role, as you have just indicated to us, mandated you to say whatever you thought was proper? Did you think confusion would come out of it? Did you ever consider that?

The Witness: In the prior representation, an issue would come out of that?

The Court: No, that when you made these statements, did you take into consideration your prior representation, whether the public or a court or anybody else or an ethics committee might think that you were speaking out as her lawyer and that way bringing yourself into, perhaps, the case itself?

The Witness: No, Judge, I did not consider that. In fact, I viewed my role, one, as her advocate, if you may, in federal courts. I saw and made comments from time to time with respect to that case and other cases that I have been involved in. I really didn't see that as an issue. When I spoke in New Brunswick at the press conference, I pointed out very specifically I was not dealing with the matter (14) that was in Federal Court, I was dealing with a condition that existed in the State proceedings and I daresay that the lawyers who represented her in the State proceedings subsequently went into Federal Court to seek some removal, some relief by way of removal, but I was not—I did not view myself as being involved in that.

The Court: It never entered your mind that you were speaking on her behalf, as her lawyer at that time.

The Witness: No, no.
The Court: Okay. Mr. Moore.

Cross-examination by Mr. Moore:

Q. Now, review P-2 in evidence, please.

(Witness complies.)

In reference to P-2 in evidence, do you recall making this statement on January 20 that the trial before Judge Appleby was a travesty, "travesty"? A. Yes.

Q. You also recall saying that Judge Appleby, "Did not have the judicial temperament and racial sensitivity to sit as an impartial judge." (15) A. Yes.

Q. Did you also refer to the trial as a "legalized lynching"? A. I don't recall that precisely.

Q. You don't recall that? A. No, I don't recall that.

Q. Do you recall saying that the way Judge Appleby was questioning the jurors was, "leading to the creation of a hangman's court"? A. I don't recall that. I recall saying a kangeroo court but I don't recall a hangman's court.

Q. Do you recall referring to it as a kangeroo court but not as a hangman's court? A. Yes, I do recall that.

Q. Do you recall saying that because Judge Appleby had, "gagged," the defense team, that you had to act as spokesman for the defense team? A. No, I don't recall saying that.

The Court: That is consistent with what you were just saying a little while ago.
The Witness: Well, I said that I did—

The Court: The defense team was one thing and you were another. I infer that from the quote.

The Witness: Yes, but I do not—I (16) think that was the editors putting that together in that fashion. The reporters might have asked me whether or not I was aware that the defense team were gagged and I might have said, yes, but I don't recall saying that, because—

Q. You don't recall saying you were a spokesman for the defense team? A. No, I did say I was speaking for the defendant.

Q. You do admit that that is what the newspaper article says. A. That is what it says, yes.

Q. Have you subpoenaed Mr. Hayes or Miss McIntyre to testify or to retract these statements that they attributed to you in the newspaper article? A. I don't know what my lawyers have done.

Q. You mentioned other actions in Federal courts that you filed on behalf of Joanne Chesimard. What actions were you referring to? A. I think that there was a matter which was brought before Judge Barlow sometime around 1976 or thereabouts in which we asked for injunctive and declaratory relief to enjoin the authorities, sheriff and freeholders, I think, from keeping Miss Shakur in the basement of the all-mens jail and to remove her to a facility where all women, pretrial detainees were (17) being held. That matter was heard by Judge Barlow and following that he ruled that she required to be given Fourteenth Amendment due process rights pursuant to and ordered that an administrative hearing be held. Do you want me to go through this?

Q. Yes, I am interested in the other actions. A. An administrative hearing was held at which point the Ad-

ministrative Officer ruled that the prison authorities were, in fact, holding her illegally and ordered she be sent over to the womens' detention. The prison authorities decided that they were going to follow the recommendation or the Order of the hearing officer that they hired. We then came back before Judge Barlow for an equivalent of a Writ of Mandamus but—it isn't a Writ of Mandamus, it is a Direct Order and Judge Barlow gave the prison administrators, I think, 30 days in order to take whatever corrective action. We then went back to the State Court, and the State Court ruled, Judge Demos ruled that the prison authorities could appeal the decision of the hearing officer. That was appealed and the Superior Court in the State of New Jersey ruled that the hearing officer was arbitrary in his decision and at that point in time, the trial began (18) and I did not pursue the matter any further. In fact, the matter was subsequently dismissed. But this took, incidentally, over a year back and forth in the courts.

Q. Did you file the motion in Federal Court to stay the jury selection process? A. To stay the jury—no.

Q. Who filed that, if you know, on behalf of the defendant? A. To stay the jury? I don't know.

Q. And have the matter removed to Federal Court. A. I think that that was filed by her lawyers, Mr. Kuntzler and the others, but I really don't know anything about it. I do know that I was consulted about the status of the Federal litigation and her lawyers asked me for copies of my pleadings which were in the Federal Court and I assume that they had incorporated it, as part of their reasons for their removal of the conditions proceedings which included the litigation so my pleadings may have been part of that but I gave it to them but, in fact, I have not even reviewed—if you ask what did the final document look like, I haven't seen it.

Q. So you think your pleadings may have (19) been used in the Federal action to stay jury selection and have the case removed? A. I assume part of it might have been. I was asked for the status of the matter and then asked whether or not I had extra copies of the pleadings.

> The Court: Was that a courtesy or were you retained to do that?
>
> The Witness: No, I was not retained. I did it as a matter of course with lawyers who consult with me from around the country on matters, ask me for copies or pleadings and so on and I sent them.

Q. So you assisted the defense team in that respect. A. Assisted them as I assist any lawyer who asks, as a matter of courtesy, for assistance.

Q. Did you ever have a meeting with the defense team or discuss the Federal civil litigation that you were handling? A. No, no, no.

Q. When did you open your office in New Brunswick? A. That office was opened prior to my being a lawyer. In fact, I used to be the Director of the Heritage Foundation and the office was there then when (20) I was admitted to the Bar in '73, January of '73, so you can say I opened an office there at the same site.

Q. From 1973? A. Yes, January of '73.

Q. What is the National Jury Project or what was the National Jury Project? A. What is the National Jury Project? To the best of my information, and I am not speaking with any degree of authority or competence on this subject, but I think the National Jury Project is a private unincorporated association, that is my thinking, and that they are made up of social scientists and lawyers but, again, I am not sure whether there are any lawyers.

I do definitely know there are social scientists, psychiatrists, sociologists, behavioral scientists who make correlations and studies with respect to these attitudinal surveys which are used with respect to research on juries.

Q. Do you know whether the National Jury Project investigated the background of potential jurors in the Joanne Chesimard case? A. Let me say the National Jury Project used my office at 94 Bayard Street as courtesy, in addition to the defense lawyers who came from all over. Some (21) came from New York, some came from Mississippi. They used my office.

Q. The National Jury Project was asked to investigate the background of potential jurors in the Joanne Chesimard case, is that correct? A. I don't know about that. You'd have to ask the defense lawyers about that.

Q. In any event, you provided them office space. A. They asked me for office space. The defense lawyers asked me whether or not they could use my office during th length of the trial, the duration of the trial, and I agreed.

Q. What lawyers used your office on the defense team? A. Who actually there were I don't know because, quite frankly, I operated out of New York and only with respect to my matters in New Jersey, I tended to use that office but most of the time I was traveling around the country or in New York.

Q. But didn't— A. Let me finish. I do not know who, specifically, used the office, how often they were there, etc. I gave my approval for that office to be used by the National Jury Project or by the people associated (22) with that project and with them.

Q. So you assisted the defense team in providing office space, for not only defense lawyers, but also this National Jury Project? A. Let me say again, as a courtesy, they asked me whether or not they could use my office.

It is very similar, for example, to the fact that as a courtesy, the law offices of Mandel, Wysoker & Weingartner agreed for us or for me to use their offices while I was taking depositions of all of the witnesses in this particular case; only because I do not have an office in New Brunswick and that is a common courtesy that is utilized between members of the Bar, as I understand it.

Q. Do you remember an incident during the pretrial motions of the Joanne Chesimard trial and an incident where you attempted to sit at counsel table? A. No. As I recall what occurred, it was the first day of the trial, the first day of the trial in which there was a lot of confusion with respect to where various people were seated and so on and I was asked to come forward and as I was moving forward, one of the court attendants asked me whether or not I was counsel of record and I said no, and he said, (23) you cannot come forward. In fact, I wasn't able even to speak to Miss Chesimard. I wanted to talk to her about some matters because, as I said to you, the trial was contemporaneous with the ending of part of the Federal litigation and I could not even speak to her there unless I was counsel of record. They told me that I had to speak to her back in her prison cell.

Mr. Moore: As your Honor might certainly understand, I was not prepared here to try the merits of whether he was associated with the defense team or not.

The Court: Yes, and it is not part of my decision, really.

Mr. Moore: I have no other questions.

The Court: Did you know any of the members of the Ethics Committee? They changed it around since but did you know who testified here, who instigated this action here? Did you know any of them?

The Witness: Let me see. Who do I know? No, I did not know any of these people, Judge, but it is fair to say that given the nature of my position with the Conference of Black Lawyers and the sensitivity of many issues (24) that I have spoken about, that they may have known me.

The Court: You did not know any of the members personally?

The Witness: No, no.

Testimony of Victor Goode, called as a witness for the Plaintiffs.

VICTOR GOODE, having first been duly sworn, testifies as follows:

Direct examination by Mr. Freamon:

Q. Mr. Goode, what is your present occupation? A. I am the National Director of the National Conference of Black Lawyers.

Q. Are you an attorney at law? A. Yes, I am. I am an attorney here in the State of New Jersey.

Q. And for how long have you been admitted? A. Since 1974.

Q. And how long have you been associated with the National Conference of Black Lawyers? A. I joined the National office staff as the Associate Director in 1975

and I assumed the position of National Director September 1 of 1978.

(25) Q. So you were employed by the National Conference during the time of the Assata Shakur trial, is that correct? A. That's correct.

Q. You heard Mr. Hinds testify about the job title and the duties and the mandate of the Director of the National Conference, the job of the National Conference of Black Lawyers, you heard his statements before? A. Yes.

Q. Have those duties or the mandate changed in any way since you have assumed the Directorship? A. No, they have not. I am still responsible to be a national spokesperson for the National Conference of Black Lawyers and to address the whole breadth and range of issues that Mr. Hinds testified to.

Q. As part of your function, do you have occasion, as Mr. Hinds spoke about, travel or consult with other groups of black lawyers with respect to some of the issues, with respect to racism in the courts and racial discrimination as he testified to?

Mr. Moore: I have to object again. The issue before your Honor is bad faith on the part of the defendant. This is totally (26) irrelevant.

The Court: I know, but they are trying to give me, I think, and correct me if I am wrong, trying to give me a picture of what Mr. Hinds' role is, whether it was in accord with the principles of the National Conference.

Mr. Moore: I don't contest that.

The Court: I will allow it. Go ahead.

Mr. Freamon: Can you read the question?

(Whereupon the pending question is read back by the reporter.)

A. Yes, I do travel extensively and talk to numerous groups, primarily of black attorneys about these issues.

Q. Could you enumerate for the Court some of the groups you have spoken to in the past? A. The Garden State Bar Association, the Association of Black Women Lawyers, the Black American Law Students Association, the National Bar Association, other black bar associations in other states around the country, other legal organizations that also are concerned about racial discrimination in the administration of justice, such as the ACLU, the National Lawyers Guild and others.

Q. Have you had occasion to speak for (27) defendants who are involved in cases that the National Conference of Black Lawyers is concerned with or speak on behalf of them? A. Yes, on some occasions.

Q. Now, have you had occasion to speak in New Jersey about cases or matters that concern the N.C.B.L. since the time the charges were brought against Mr. Hinds? A. Yes, I have spoken in New Jersey on at least half a dozen occasions; not specifically representing a particular defendant, but on several issues concerning the administration of justice and questions of racial discrimination and the administration of justice.

Q. Is there any reason why you have not spoken on behalf of any particular defendant? For example, Mr. Stavis mentioned the Merrit case. Is there any particular reason for that? A. Well, there is considerable confusion in my mind as to the posture that I can take, consistent with my job responsibilities, while not being subjected to disciplinary proceedings by ethics committees here in the State of New Jersey.

Victor Goode, Esq.—for Plaintiffs—Cross

Q. So in other words, you are unable to carry out at this time the function of the office you (28) hold now? A. Well, I am unclear as to how far, as I see it, I can carry out my responsibilities. We were approached very recently about a rape case in Camden County in which the victim was white and the defendant in that case was black and I am expecting calls from the attorney who is an N.C.B.L. member, the attorney of record in the case, the defense counsel, and again, I am unclear as to precisely what the results of any comments I may make on the quality of the administration of justice or the question of racial discrimination in cases such as that.

The Court: Was your caution precipitated by Mr. Hinds' dilemma?

The Witness: Yes, your Honor. I have been aware of the details of Mr. Hinds' dilemma. I was the associate director when the initial proceedings by the Middlesex County Ethics Committee were brought against Mr. Hinds and as an attorney here in the State of New Jersey, and as his immediate successor in office holding the same responsibilities, I am quite cautious now about the consequences of my own conduct.

Mr. Freamon: No further questions.

(29) *Cross-examination by Mr. Moore*:

Q. Mr. Goode, are you licensed to practice here in the State of New Jersey? A. Yes, I am.

Q. And you are not, in any way, suggesting that as Director of the National Conference of Black Lawyers, you would be immune from the operation of the code of professional responsibility, are you? A. No, I am not suggesting that.

Victor Goode, Esq.—for Plaintiffs—Redirect

Mr. Moore: That is all.
The Court: Anything else?

Redirect examination by Mr. Freamon:

Q. Mr. Goode, for instance, in this Camden County case, are you, in any way, associated with the defense in that case? A. No, I am not.

Q. And do you see your right to speak or to become involved in that case as—do you see this proceeding involving Mr. Hinds as having any effect upon your decision, whether or not to speak on behalf of that defendant in that case? A. Yes, I am very cautious about the situation. As I said, the attorney of record in the case is an (30) N.C.B.L. member; that is, he has a membership in our organization.

Q. What does that mean? A. Well, N.C.B.L. members generally pledge themselves to donate their time, their energies to issues and to cases that will help alleviate racial discrimination in this country and institutional racism in this country and they have organized together in a Bar Association so that their efforts can be collectively applied to issues and they can receive guidance and support from the National Office.

[Certification Omitted in Printing]

Order

(Filed—January 14, 1980)

[Caption Omitted in Printing]

This matter having been opened to the Court by motion pursuant to Rule 59(e) to alter or amend the judgment of the Court as it appears in the Order of the Court dated June 20, 1978, said motion having been made by Bernard K. Freamon, Esq., Lewis Myers, Esq., Alfred A. Slocum, Esq. and Morton Stavis, Esq. attorneys for the plaintiffs herein, and the Court having reopened the matter to permit plaintiffs an evidentiary hearing, and such evidentiary hearing having been concluded;

It is on this 14th day of January, 1980, for the reasons stated in the Memorandum Opinion filed June 6, 1978 and for the reasons stated in the Letter Opinion filed December 13, 1979, hereby

Ordered that plaintiffs' motion for a preliminary injunction be and is denied, and it is

Further Ordered that defendant's motion for dismissal of the complaint be and is granted.

Honorable Clarkson S. Fisher, U.S.D.J.

Notice of Appeal

(Filed—January 24, 1980)

NOTICE IS HEREBY GIVEN that the Garden State Bar Association, The New Jersey Association of Black Women Lawyers, the National Conference of Black Lawyers, and Lennox Hinds, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Third Circuit from the Order entered in this action on Jauuary 14, 1980, denying plaintiffs' motion for a preliminary injunction and dismissing the Complaint herein.

Dated: Newark, N. J.
January 23, 1980.

Attorneys for Plaintiffs

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(201) 622-3789
By: MORTON STAVIS

Order

(Filed—April 14, 1980)

[Caption Omitted in Printing]

This matter having been opened to the Court by Bernard K. Freamon, Attorney for Plaintiffs, Mary Ann Burgess, Deputy Attorney General (N.J.) appearing in opposition, and the Court having considered the argument of counsel and papers submitted by both parties, and good cause having been shown, pursuant to R. 62(c) F.R.C.D. 28 U.S.C.A.;

It is on this 14th day of April, 1980

Ordered that all proceedings by Defendant, Middlesex County Ethics Committee, its agents, attorneys, employees, and successors, against plaintiff Lennox Hinds, arising out of plaintiff's alleged statements to the press on or about January 20, 1977 shall be stayed pending the hearing and disposition of plaintiffs' appeal to the 3rd Circuit Court of Appeals and until further order of the Court.

Clarkson S. Fisher

Correspondence Appended to Appellants' Response to Petition for Rehearing, Not Previously Before the Court

(Filed—March 27, 1981)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-1224

GARDEN STATE BAR ASSOCIATION, AND THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, BOTH CORPORATIONS ORGANIZED UNDER THE LAWS OF THE STATE OF NEW JERSEY; NATIONAL CONFERENCE OF BLACK LAWYERS, A CORPORATION ORGANIZED UNDER THE LAWS OF THE DISTRICT OF COLUMBIA and LENNOX HINDS,

Plaintiffs-Appellants,

v.

MIDDLESEX COUNTY ETHICS COMMITTEE, AN AGENCY ESTABLISHED BY THE SUPREME COURT OF NEW JERSEY,

Defendant-Appellee.

CIVIL ACTION—ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.
SAT BELOW: FISHER, U.S.D.J.

Correspondence Appended to Appellants' Response to Petition for Rehearing, Not Previously Before the Court

MORTON STAVIS
COUNSELLOR AT LAW

744 Broad Street (201) 622-3789
Newark, New Jersey 07102 (201) 622-3649

June 20, 1978

Dickinson R. Debevoise, Chairman
Disciplinary Review Board of the
State of New Jersey
744 Broad Street
Newark, N. J. 07102

Re: *Lennox S. Hinds*

Dear Mr. Debevoise:

I am sure you are aware of the *Hinds* case, now wending its way through the disciplinary procedures of the State of New Jersey. Two developments should be called to your attention:

1. The Fair Trial/Free Press Committee of the A.B.A. has made its final report, and I am enclosing a copy of that portion which deals with extra-judicial statements by lawyers. You will note that the A.B.A. Committee is proposing a major modification of the earlier standards upon which New Jersey patterned its disciplinary rules. Plainly, the charges against Mr. Hinds could not be sustained under the proposed standards.

2. Judge Fisher of the United States District Court for the District of New Jersey has decided that the fed-

eral court, on grounds of abstention, should not entertain an injunction proceeding to stop the disciplinary proceeding in New Jersey. We intend to appeal the decision of the District Court.

Meanwhile, in view of the actions of the A.B.A. Committee, it has occurred to us that some agency within the State with responsibility for enforcement of the ethical standards upon New Jersey lawyers might concern itself with whether the proceedings undertaken by the Middlesex County Ethics Committee are not plainly ill-advised. I suspect that if some superior authority were to look into this matter, the State might be saved a good deal of embarrassment and Mr. Hinds a good deal of needless litigation.

It may assist your consideration of this matter to know that even the State of North Carolina, on learning of impending changes in the A.B.A. standards, thought it appropriate to defer the trial of proposed disciplinary proceedings against Mr. Jerome Paul (Joan Little's lawyer), for his having made extra-judicial comments.

Very respectfully yours,

Morton Stavis
One of Counsel to Mr. Hinds

MS:mbt

Enclosure

By hand

cc: Stacy L. Moore, Jr., Esq.

Correspondence Appended to Appellants' Response to Petition for Rehearing, Not Previously Before the Court

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Correspondence Appended to Appellants' Response to Petition for Rehearing, Not Previously Before the Court

June 22, 1978

Morton Stavis, Esq.
744 Broad Street
Newark, New Jersey 07102

Re: *Lennox S. Hinds*

Dear Mr. Stavis:

Thank you for your letter of January 20, 1978 and for the enclosures which accompanied it. Copies have been distributed to all members of the Disciplinary Review Board.

For some months there has been pending before the Disciplinary Review Board an application of the Middlesex County Ethics Committee that a person from the Administrative Office of the Courts (Central Ethics) be designated to process the charges which were filed against Mr. Hinds. A copy of the Order to Show Cause in the Federal proceedings was served upon Robert E. Cowen, Esq., of Central Ethics. The order contained a restraint against further proceedings in the State disciplinary action, and although the copy of the order which was served did not show the Judge's signature, the Disciplinary Review Board assumed that the original had been signed. In view of the order of the United States District Court prohibiting prosecution of the State proceedings, no action has been taken upon the application of the Middlesex County Ethics Committee and no action of any sort will be taken in the matter so long as the Federal Court order remains in effect.

You may recall that in March of 1977 you and I discussed the general subject of attorneys' First Amendment Rights. It was your suggestion that I form a committee

to study the subject and in connection with such suggestion, you sent to me a letter listing various authorities. As I recall, you were counsel for Mr. Hinds at the time but the work of the committee was to deal with the subject of free speech for lawyers generally, rather than with respect to the particular case of Mr. Hinds. By reason of other pressing matters, I never pursued the idea of forming a committee further.

I have informed the Disciplinary Review Board of these prior communications and its members do not believe that they require that I disqualify myself in the Hinds matter now pending before the Middlesex County District Ethics Committee. If you or Mr. Hinds are of the view that our prior communications require that I disqualify myself, I wish you would advise me of this fact so that I can take appropriate action.

Very truly yours,

DICKINSON R. DEBEVOISE

DRD:lh

cc: Robert E. Cowen, Esq.

Correspondence Appended to Appellants' Response to Petition for Rehearing, Not Previously Before the Court

MORTON STAVIS
COUNSELOR AT LAW

744 Broad Street
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June 27, 1978

Dickinson R. Debevoise, Esq.
Chairman, Disciplinary Review Board
of the State of New Jersey
744 Broad Street
Newark, N. J. 07102

Re: Lennox S. Hinds

Dear Mr. Debevoise:

Thank you for your letter of June 22, 1978.

The order to show cause which you sent to me was in fact signed by Judge Fisher on March 1, 1978, but the docket entries show that on March 20 the motion was withdrawn.

Judge Fisher's decision of June 20, 1978, was in response to a subsequent motion that we made on April 18 and a cross-motion filed by the defendants on May 4.

In view of the information in your letter as to the application made by the Middlesex County Ethics Committee to the Disciplinary Review Board, that a person of the Administrative Office of the Courts be designated to process the charges against Mr. Hinds, the suggestion which I made to you in my letter of June 20 seems even more pointed.

Correspondence Appended to Appellants' Response to Petition for Rehearing, Not Previously Before the Court

It would appear to me that the Disciplinary review Board, in passing upon the application by the Middlesex County Ethics Committee, would wish to take into consideration the changes in this field as reflected in the A.B.A. proposals. If it would be of any assistance, we would be happy to make a presentation of this position before the Disciplinary Review Board.

Anent the question raised in the last paragraph of your letter, please be advised that both Mr. Hinds and his counsel share the view of the members of the Disciplinary Review Board, namely, that it is not required that you disqualify yourself in the *Hinds* matter.

Very truly yours,

MORTON STAVIS

MS:mbt

Correspondence Appended to Appellants' Response to Petition for Rehearing, Not Previously Before the Court

SUPREME COURT OF NEW JERSEY

Disciplinary Review Board

[SEAL]

Dickinson R. Debevoise, Esq., Chairman
Mr. Charles A. Agemian
A. Arthur Davis, 3rd, Esq.
Hon. Theodore J. Labrecque
Arthur S. Lane, Esq.
Hon. Leon Leonard
Mrs. J. Duncan Pitney
Mr. Frederick A. Schenck
Hon. Hugh C. Spernow

Principal Office
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State House Annex
C.N. 037
Trenton, New Jersey 08625
(609) 292-8750
Robert E. Cowen, Sec.

July 31, 1978

Morton Stavis, Esq.
744 Broad Street
Newark, New Jersey 07102

RE: *In the Matter of Lennox Hinds*
Docket No. DRB 78-7

Correspondence Appended to Appellants' Response to Petition for Rehearing, Not Previously Before the Court

Dear Mr. Stavis:

The Disciplinary Review Board has had brought to its attention your letters of June 20th and June 27, 1978. The Board has directed me to advise you that they are not at this time considering the requests set forth in your letters or, for that matter, any aspect of the case whatsoever until such time as the federal litigation is concluded.

Very truly yours,

Robert E. Cowen
Secretary
Disciplinary Review Board

REC:gt

cc: Dickinson R. Debevoise, Chairman
Disciplinary Review Board

Appendix

1

81-460

LODGING

RECEIVED
MAR 16 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF NEW JERSEY

Docket No. D-61

In the Matter of :
:
LENNOX S. HINDS, :
:
An Attorney at Law :

BRIEF FOR APPELLEE

COLETTE A. COOLBAUGH
Assistant Director
Ethics and Professional Services
Taylor Place and Capitol Street
CN 037
Trenton, New Jersey 08625

HAROLD L. RUBENSTEIN
Staff Attorney
Ethics and Professional Services

On the Brief

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"Professional Ethics and Trial Publicity: What All The Talk Is About - Chicago Council of Lawyers v. Bauer". 28

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PROCEDURAL HISTORY

This matter is before the Court pursuant to an Order of November 9, 1981 requiring the submission of briefs to determine the constitutionality of DR 1-102 and DR 7-107(D).

The constitutional challenge to these rules is brought by Lennox Hinds, an attorney licensed to practice in New Jersey. He is charged with violating DR 1-102(A)(5) and DR 7-107(D) because of statements made at a press conference called by him on January 20, 1977 during the murder trial of Joanne Chesimard. At that conference, Mr. Hinds impugned the integrity of the trial judge and severly criticized his conduct of the court proceedings.

The statements made by Mr. Hinds were reported by the press and subsequently brought to the attention of the Middlesex County Ethics Committee, who assigned David M. Foley, Esq. to investigate the matter. Mr. Foley wrote to Mr. Hinds on February 24, 1977 requesting a meeting as part of the investigation. Mr. Hinds refused, but publicly revealed Mr. Foley's request, which was again reported by the press.

The ethics investigation was stayed pending the completion of the Chesimard trial. Thereafter, Mr. Hinds continued in his refusal to meet with Mr. Foley. Consequently, the investigation was conducted without his cooperation. On December 22, 1977, a statement of charges was filed by the Middlesex County Ethics Committee, and on January 3, 1978, these charges were served on Mr. Hinds.

Pursuant to R. 1:20-4(c) [now R. 1:20-2(j)], Mr. Hinds had ten days in which to file an answer. Despite requesting and being granted two extensions of time, no answer was ever filed. Instead, Mr. Hinds filed a complaint in Federal District Court on February 10, 1978 seeking to enjoin the disciplinary proceedings and obtain a judgment that the disciplinary rules under which he was charged were unconstitutional. In addition, Mr. Hinds claimed that both the Ethics Committee and the New Jersey Supreme Court were biased tribunals incapable of affording him a fair and impartial forum in which to litigate his constitutional challenges.

The Federal District Court refused the requested relief on December 13, 1979. However, on April 14, 1980, that court did issue a stay of the disciplinary proceedings pending an appeal to the Third Circuit.

On appeal, the decision of the Federal District Court was reversed on the grounds that that Court should not have abstained from denying the injunction. In a later denial for a rehearing, however, the Court of Appeals stated that it did not intend that the New Jersey proceedings should be stayed pending the federal proceedings.

Consequently, on June 3, 1981, the New Jersey Supreme Court issued an Order directly certifying the complaint against Lennox Hinds, pursuant to R. 2:12-1. The Order required the respective counsel for Mr. Hinds and the District VIII Ethics Committee (the successor to the

Middlesex County Ethics Committee) to file briefs "addressing the question of whether further factual findings are necessary to adjudicate the constitutionality of DR 1-102 and DR 7-107(D), both on its face and as applied to respondent."

The brief filed on behalf of Mr. Hinds asserted that no further factual hearings were necessary. The one filed on behalf of the Ethics Committee agreed that the Court could consider directly, without factual hearing, the facial constitutionality of the above Disciplinary Rules, and "following this determination, whether these portions of the Code of Professional Responsibility as construed, would encompass the conduct disclosed by the record." However, that brief also stressed that further investigation by the Ethics Committee would be necessary once this Court provided its interpretation of the facial constitutionality of the applicable Disciplinary Rules since certain questions about Mr. Hinds' association with the Chesimard defense team remained unresolved.

No further factual proceedings were ordered and the Court then issued its present Order.

COUNTERSTATEMENT OF FACTS

Joanne Deborah Chesimard (also known as Assata Shakur) was arrested on May 2, 1973 following the fatal shooting of a New Jersey State Trooper. Shortly thereafter, Ms. Chesimard was indicted for murder. Also indicted for the murder was Clark Edward Squire.

A joint trial was started on October 9, 1973. However, because Ms. Chesimard was pregnant the state moved for severance of trials. The motion was granted on February 1, 1974 and a mistrial was declared as to Ms. Chesimard. The Squire trial continued and he was convicted on March 11, 1974.

Due to extensive pre-trial motions, including various motions for the admission of out-of-state attorneys pro hac vice, the Chesimard murder trial did not begin again until 1977. Prior to that time, Lennox Hinds (hereinafter Appellant) filed a suit in federal court on behalf of the defendant seeking to change the conditions of her pre-trial confinement.

Jury selection began on January 17, 1977. Judge Theodore Appleby, of the Superior Court, presided over the trial. On January 18, 1977, Evelyn Williams, Esq., one of the members of the Chesimard defense team, motioned before Judge Barlow of the United States District Court for the District of New Jersey to have the case removed to federal court. Judge Barlow denied the application on January 20, 1977. Also on that date, Judge Garth of the Third Circuit Court of Appeals refused to stay jury selection.

Appellant called a press conference on that date as well. The conference, held at Appellant's office in New Brunswick, was attended by members of the press and television. At the conference, Appellant criticized the conduct of the trial, and more specifically, that of the trial judge (Appleby).

The next day, January 21, 1977, an article appeared in the New York Daily News reporting the comments made by Appellant. Under the heading "Joanne Loses 2 Rounds in Trial Transfer", the article stated:

> "...Lenox [sic] Hinds, an attorney also representing Mrs. Chesimard, said the defense team wanted the case moved to another court because in New Brunswick 'what we are seeing is legalized lynching'.
>
> He said he was speaking for the defense team because its members were "gagged" by Judge Appleby whom he accused of asking prospective jurors self-serving questions which he said were leading to 'the creation of a hangman's court'."

An article also appeared in the Newark Star-Ledger on that same date in which Appellant was reported as having called the state proceeding "a travesty". The article continued:

> "Hinds charged that Superior Court Judge Theodore Appleby 'does not have the judicial temperament or the racial sensitivity to sit as an impartial judge' in Chesimard's trial."

This article identified Appellant as the executive director of the National Conference of Black Lawyers, and specifically as not being a member of the defense team. The reference to the trial as "a legalized lynching" against appeared.

A television reporter for the New Jersey Public Broadcasting Authority (Channel 52) recorded the press conference. A tape recording contained the following comments by Appellant:

Mr. Hinds: "We feel that it is a kangaroo - it will be a kangaroo court unless the judge recluses [sic] himself and that will be the very minimum."

Reporter: "And a kangaroo court means a guilty verdict?"

Mr. Hinds: "That's correct."

The newspaper articles were brought to the attention of David M. Foley, Esq., a member of the Middlesex County Ethics Committee (now known as the District VIII Ethics Committee). At its February meeting,

the Committee authorized Mr. Foley to investigate the matter for possible violations by Appellant of the Disciplinary Rules of the Code of Professional Responsibility as adopted by the New Jersey Supreme Court.

On February 24, 1977 Mr. Foley wrote to Appellant and informed him that an investigation was being conducted to determine the events surrounding the press conference. In his letter, Mr. Foley requested a meeting with Appellant to discuss his actions. Although the letter to Appellant was marked "Personal and Confidential", Appellant read it at a fund raising rally for the Chesimard defense at Rutgers University on February 28, 1977. An account of this incident appeared in The Home News, a local newspaper, the next day. In that account, Chesimard's chief counsel, William Kunstler, was quoted as saying, "This threat to take away the license of a man for speaking out - you must see how inextricably it is intertwined with the fate of Assata Shakur."

Appellant refused to cooperate with the investigation. Fearing that additional publicity might adversely affect the Chesimard trial, the ethics committee stayed the investigation until the trial's completion.

During this time a massive letter writing campaign had begun urging the members of the Middlesex County Ethics Committee to dismiss the complaints against Appellant. In fact, no complaints had yet been filed because the investigation was still in abeyance.

Once the Chesimard trial ended, Appellant sought and received a sixty day stay of the investigation. The extension was granted with the understanding that at its expiration Appellant would fully cooperate with the investigation. However, Appellant continued in his refusal, and the ethics committee authorized Mr. Foley to proceed with his investigation without Appellant's cooperation. At this stage of the proceeding, Mr. Foley sought only to determine whether or not there was

any evidence of unethical or unprofessional conduct. Based on his findings, Mr. Foley could recommend to the ethics committee that a formal Statement of Charges be prepared, or the complaint should be dismissed.

Without Appellant's cooperation, Mr. Foley relied upon interviews he conducted with the reporters from the New York Daily News, the Newark Star-Ledger and the New Jersey Public Broadcasting Authority. Mr. Foley deliberately did not contact any members of the Chesimard prosecution, the defense team, the National Conference of Black Lawyers or Judge Appleby. In this way, he was able to elicit a neutral account of Appellant's comments, without the actual or apparent influence of any of the direct participants to the Chesimard state criminal litigation.

On December 22, 1977 Mr. Foley submitted his report to the Middlesex County Ethics Committee. After reciting the basic factual background of the controversy and the unwillingness of Appellant to participate in the investigation, he concluded that the statements made at the press conference were violative of the following rules: DR 1-102(A)(5), that a lawyer "shall not...engage in conduct that is prejudicial to the administration of justice," and DR 7-107(D),

> "During the selection of a jury or a trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making any extra-judicial statement that he expects to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial...."

Specifically, Mr. Foley found that Appellant represented himself as a member of, and spokesman for, the defense team, and that his comments were made for public dissemination in order to influence prospective jurors.

The ethics committee accepted the report on December 29, 1977,

and charges were served on Appellant five days later. Pursuant to R. 1:20-4(c) Appellant had ten days in which to file an answer with the committee. He requested two extensions of time, which were granted, but no answer was filed. Instead, he filed a complaint in Federal District Court seeking federal court intervention to enjoin the disciplinary proceedings and declare DR 1-102(A)(5) and DR 7-107(D) unconstitutional.

ARGUMENT

I

THE LIMITED CONSTITUTIONAL RIGHT TO CRITICIZE A JUDGE

Traditional restrictions on the free speech and associational rights of attorneys have recently come under examination by the Supreme Court of the United States. While the Court has eliminated some of these restrictions, Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (advertising), Golfarb v. Virginia State Bar, 421 U.S. 773 (1974) (minimum fee schedules), In re Primus, 436 U.S. 412 (1977) (associational solicitation), others have withstood constitutional challenge. Ohralik v. Ohio State Bar Association, 436 U.S. 477 (1977) (in person solicitation).

The case before this Court presents a further challenge to a traditional restriction. Appellant argues that there is a constitutional right to criticize judges, "even robustly, in and out of court by lawyers as well as laymen and even midst their handling matters ...." (Pb11-10). Aligned against this alleged right are certain Disciplinary Rules of the Code of Professional Responsibility, originally promulgated by the American Bar Association and adopted with emendations by the Supreme Court of New Jersey. The purpose of the Disciplinary Rules generally is to govern the conduct of members of the bar. R. 1:14. Accordingly, these Rules sometimes impose restrictions otherwise inapplicable to

members of the public who are not attorneys. Such is the case here. Appellant is charged with violating two disciplinary rules, DR 1-102(A)(5) and DR 7-107(D), arising out of accusations made against a judge then presiding over a sensational and well-publicized murder trial. Appellant argues that these Disciplinary Rules, against which the propriety of his conduct is to be judged, conflict with his constitutionally protected guarantees of free speech. In such a conflict, he says, the latter must prevail.

Appellant ostensibly draws support for his position from a number of decisions of the United States Supreme Court. He claims that these decisions establish an unbridled right of free speech, including the right to critically comment in an offensive manner, so long as that speech does not constitute an actual obstruction to the administration of justice. (Pb12-10)

In fact, however, the Supreme Court rejected this very claim over a century ago. In Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872), the Court upheld the disbarment of Bradley, an attorney who had defended one of the conspirators in the assassination plot against Abraham Lincoln, because he had made threatening and insulting remarks to the trial judge. While recognizing the severity of disbarment, the Court nevertheless felt that Bradley's comments warranted such a penalty. Addressing itself to the issue of the insulting remarks, the Court said:

> "[T]he obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial office. This obligation is not

> discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts." Id., at 355.

An attorney's obligation to the courts is one of continuing vitality. Included within this general obligation is a more particular one that attorneys refrain from personal attacks on the integrity of judges. In re Sawyer, 360 U.S. 633 (1959), Appellant seeks to dispute this latter obligation by claiming that there is a "consistent series of cases" which demonstrate that the First Amendment protects such vituperative attacks.

An examination of the cases relied on by Appellant reveals that they hardly support the proposition which he gleans from them.

This is most apparent in In re Sawyer, Id. where the Court makes it unmistakably clear that while generalized critical analyses of the law and judiciary may be permissable, direct and personal attacks on a judge are not.

In that case, Sawyer was disciplined for criticizing a judge presiding over Smith Act prosecutions in a public speech made during the pendency of a trial in which she was defense counsel. In reversing the disciplinary action, the Court specified that it was deciding the matter solely on the basis of whether the facts supported the charge of impugning the integrity of the trial judge (Wiig). Id., at 626. The Court found that the facts did not support the charge, primarily because the judge was not mentioned

by name, Id., at 634, and because the speech was merely a criticism of Smith Act prosecutions generally, Id., at 633. The Court, therefore, concluded as a factual matter that Sawyer's comments were "not a reflection in any wise upon Judge Wiig personally or his conduct of the trial." Id., at 628. Sawyer's criticism "simply cannot be equated with an attack on the motivation or the integrity or the competence of the judges." Id., at 632.

Had Sawyer's remarks been directed specifically at Judge Wiig, however, and designed to challenge his integrity, the Court indicated that they would then certainly be censurable. Responding to the claim that a lawyer can criticize a judge personally so long as he does not have a case then pending before that judge, the Court said:

> "A lawyer does not acquire any license to do these things by not being presently engaged in a case. They are equally serious whether he is currently engaged in litigation before the judge or not... Judge Wiig remained equally protected from Statements impugning him, and petitioner remained equally free to make critical statements that did not cross that line." Id., at 636.

The unmistakable import of the Court's remarks is that there are limitations on the critical comments that a lawyer may make concerning a judge and that these limitations are not constitutionally infirm. Indeed, as Justice Stewart made clear in his concurrence, the Constitution does not immunize a lawyer for his intemperate remarks made under the guise of the First Amendment. "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." Stewart, concur., Id. at 646, 647. Even Justice Frankfurter, who

dissented from the Court's findings of fact, stated that same conclusion with equal vigor:

> "Certainly this Court, the supreme tribunal charged with maintaining the rule of law, should be the last place in which these attacks on the fairness and integrity of a judge and the conduct of a trial should find constitutional sanction." Frankfurter, dissent, Id., at 669. 1/

It is obvious that the Sawyer case does not support the proposition Appellant wishes to draw. Nor do the other cases cited by Appellant fare much better. For example, a number of these cases, like Sawyer, were decided on the facts and so do not establish any broad based constitutional right of critical speech. Craig v. Harney, 331 U.S. 367 (1947), at 373, 374; In re Little, 404 U.S. 553 (1972), at 555, 557; Offutt v. United States, 348 U.S. 11 (1954), at 17, 18. Indeed, in the Little and Offutt matters, the Court expressly left open the possibility of retrials in order to provide a more accurate factual record by which to assess the participants' conduct. 2/ In re Little, Supra., at 557; Offutt v. United States , supra. at 18. The Supreme Court's decision to reverse the punishments originally imposed in each of these cases is, therefore, no more than an indication of a failure to find, as a factual matter, that an obstruction of justice had occurred.

1/ Interestingly, Frankfurter castigates the attorney who refers to a case as "a travesty," citing In re Howell, 10 N.J. 139(1952) for the proposition that it is the "lawyer's special role to guard and champion" the integrity of the law. Id., at 669.

2/ In Offutt, an additional and important reason for reversal was that the trial judge had become personally embroiled with defense counsel, and then later held that counsel in contempt. The Court felt that the case should be remanded for trial before a different judge. Id., at 18.

A second distinguishing feature of the cases cited by Appellant is that many of them arose as the result of contempt convictions and not in the context of a disciplinary proceeding. Craig v. Harney, supra ; In re Little, supra ; Offutt v. United States, supra ; Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1947); Brown v. United States, 356 U.S. 148 (1958). Appellant recognizes this feature of the cases but attaches no significance to it. (Pb18-30)

In fact, its significance is two-fold. First, the basic purpose of a contempt prosecution is different from that of a disciplinary proceeding. Whereas the former is designed to vindicate the authority of the Court through punishment, the latter is designed "to deal with the fitness of the court's officer to continue in that office, to preserve and protect the Court and the public from the official ministration of persons unworthy or unfit to hold such office." In re Isserman 9 N.J. 269 (1952), at 275, quoting the Supreme Court of Pennsylvania in In re Schofield, 66 A.2d 275 (Pa. 1949). Indeed, as the Supreme Court of New Jersey has continually emphasized, professional discipline primarily serves a protective, not a punishment, function. In re Pennica, 36 N.J. 401 (1963); In re Mischlich, 60 N.J. 590 (1972); In re Bregg, 61 N.J. 476 (1972); In re Sears, 71 N.J. 175 (1975); In re Stout, 75 N.J. 321 (1978). The United States Supreme Court has said the same thing. Ex parte Wall, 107 U.S. 265 (1882); In re Isserman, 345 U.S. 286 (1953).

Second, because contempt is a criminal matter and a disciplinary proceeding is not, the standard of proof necessary

tc sustain a finding of guilt differs in each case. Criminal contempt requires that the evidence establish guilt beyond a reasonable doubt. In re Baehrer, 50 N.J. 501 (1967). Disciplinary violations need be proven only by clear and convincing evidence. In re Pennica, 36 N.J. 401 (1963); In re Rockoff, 66 N.J. 394 (1975); In re Sears, 71 N.J. 175 (1976). Thus, there is a lower standard of proof required in disciplinary proceedings than in criminal cases.

This difference in the applicable standards of proof indicates a critical weakness in the cases relied on by Appellant. Since many of the cases he cites were for contempt and, moreover, were decided on the facts, the proper conclusion to be drawn is that the Supreme Court simply failed to find that the higher standard of proof -- i.e., beyond a reasonable doubt -- had been satisfied. 3/ That different standards of proof apply to different legal proceedings has long been an acknowledged principle of constitutional law.

3/ The Court's analysis of Craig v. Harney, supra., for example makes this point quite clear. Appellant approvingly quotes from that decision that "the law of contempt is not made for the protection of judges who may be sensitive..." (Pb16-14). The remainder of the paragraph from which that quote is taken, however, provides a somewhat different perspective from which to judge the import of that passage:

> "Conceivably a campaign could be so managed and so aimed at the sensibilities of a particular judge and the matter pending before him as to cross the forbidden line. But the episodes we have here do not fall in that category." Craig v. Harney, supra., at 376.

The Court is certainly not saying here that it is impermissable to punish those who criticize judges. Rather, the Court simply says that such punishment is not warranted in this instance. The question of whether punishment is warranted in a particular case is surely different from the question of whether the general form of activity is punishable at all.

Helvering v. Mitchell, 303 U.S. 391, 397 (1938); One Lot Emerald Cut Stones and One Ring v. United States, 405 U.S. 232, 235 (1972).

Contrary to Appellant's assertion (Pb18-30), the principles which guide disciplinary proceedings are not the same as those governing prosecutions for contempt. It is, therefore, somewhat misleading for Appellant to rely so heavily on contempt cases to support his position. Not only are the very purposes of a contempt proceeding and a disciplinary proceeding different, but the fact that a court may fail to find evidence sufficient to sustain a criminal conviction has no bearing on whether that very same conduct might not sustain a disciplinary sanction. In re Echeles, 430 F.2d 347, 352-53 (7th Cir. 1970); In re Doe, 95 F.2d 386, 387 (2nd Cir. 1938). See also Drinker, Legal Ethics (1953) at 37; and generally, Annotation, "Effect of Acquittal or Dismissal in Criminal Prosecution as Barring Disciplinary Action Against Attorney," 76 A.L.R.3d 1028, §3. Certainly, it is well established in this state that an acquittal in a criminal matter does not have any res judicata effect on subsequent disciplinary action. In re Callahan, 70 N.J. 178, 184 (1976); In re Pennica, supra , at 48.

The point that emerges from all of these cases, therefore, is a simple one; that disciplinary matters are fundamentally different from criminal matters and so will be treated differently by the courts. Once this point is understood, it vitiates much of the support Appellant draws from the cases he cites. For it is then seen that those cases involve

factual situations wholly at odds with that of Appellant and the broad constitutional principle he adduces is thus neither as broad nor as constitutional as he believes.

The putative constitutional right alleged by Appellant is further eroded by an examination of various state court decisions in which free speech claims were raised as defenses against the power of those courts to impose discipline. Almost uniformly, the state courts have rejected these claims. Matter of Frerichs, 238 N.W.2d, 764 (Iowa 1976) 4/ See generally, Annotation, "Attorney's Criticism of Judicial Acts As Grounds of Disciplinary Action," 12 A.L.R3d, 1408, §3 at 1412. In doing so, the courts have recognized that an attorney, both as an officer of the court and a citizen, has a right to criticize in properly respectful terms and through legitimate channels, the official acts of courts and judges. This right, however, does not extend to unfounded and intemperate criticism which creates disrespect for the courts or their decisions. State v. Nelson, 210 Kan. 637, 504 P.2d 211 (Kan. 1972);

4/ In Frerichs, the Supreme Court of Iowa rejected the attorney's First Amendment claims on the authority of In re Sawyer, Frerichs, Id., at 769, and distinguished the case from Bridges v. California, Id. at 768.

5/ In Nelson, the Supreme Court of Kansas did not impose discipline because Nelson's comments were general and the case he critically commented about had ended so that his comments no longer posed a threat to the administration of justice. supra., at 215. However, the court did cite In re Sawyer, supra., and an earlier A.L.R. Annotation on attorney criticism for the view that an attorney's right of free speech is tempered by obligations to the court and bar which ordinary citizens do not have. supra., at 214.

Matter of Friedland, 376 N.E.2d 1126, 1128 (Indiana 1976); Ramirez v. State Bar of California, 169 Cal. Rptr. 206, 619 P.2d 399 (1980).

A frequent rationale of the state court decisions is that attorneys undertake certain obligations, not imposed on other citizens, as a condition of practicing law." Membership in the bar is a privilege burdened with conditions." In re Rothman, 12 N.J. 528, 548-49 (1953) (upholding the applicability of the Canons of Professional Responsibility to New Jersey attorneys). Such reasoning has led the Nevada Supreme Court, for instance, to discipline an attorney critical of that Court's refusal to impose the death penalty on a convicted murderer.

> "We are never surprised when persons, not intimately involved with the administration of justice, speak out in anger or frustration about our work and the manner in which we perform it, and shall protect their right to so express themselves. A member of the bar, however, stands in a different position by reason of his oath of office and the standards of conduct which he is sworn to uphold." In re Raggio, 487 P2d 499, 500-501, (Nevada 1971). Accord, Matter of Frerichs, supra., at 770; and Matter of Lacey, 283 N.W.2d 250, 252 (South Dakota 1979).

The spirit of this position is also evidenced in State v. Nelson, supra., at 214.

This is not to say, of course, that an attorney loses his First Amendment rights simply by his admission to the bar. Rather, it is an acknowledgment that the guarantees of free speech must sometimes be tempered by other considerations, one of which is respect for the courts and the legal profession.

Ramirez v. State Bar of California, supra, at 406. Even courts which have refused to impose discipline for disrespectful commentaries by attorneys recognize this tension, and have protected the critical speech primarily because it was made outside of the context of a judicial proceeding. Polk v. State Bar of Texas, 374 F. Supp. 784 (N.D. Texas 1974) (criticism by attorney about his treatment as a private citizen, not as an attorney); Justices of the Appellate Division, First Department v. Erdmann, 33 N.Y.2d 559, 347 N.Y.S.2d 441, 301 N.E.2d 426 (1973) (publication of a magazine article critical of trial and appellate judges).

The view that First Amendment rights must sometimes yield to obligations arising from membership in the legal profession is not addressed by the state courts alone. In addition to Sawyer, supra, at least one federal Court of Appeals has explicitly accepted this position as well.

In Hirschkop v. Snead, 594 F2d 356 (1979), 6/ an attorney brought suit against members of the Virginia Supreme Court for adopting a disciplinary rule restricting lawyers' comments during pending litigation. 7/ Claiming that the rule violated his First Amendment right of free speech, Hirschkop sought a declaratory judgment that the rule was unconstitutional.

6/ Hirschkop will be discussed more extensively in Argument II of this brief. See pp 26 below.

7/ The rule in question, DR 7-107, is substantially the same as that adopted in New Jersey. ABA Code of Professional Responsibility by State (1980).

In rejecting this argument, the court considered the prominence of free speech in the constitutional framework, but the Court also recognized that the First Amendment did not provide an absolute prohibition on rules limiting speech by lawyers. For First Amendment purposes, lawyers were distinguishable from other persons or groups, particularly the news media. While "the press may publish any information in its possession as far as these rules are concerned, ... lawyers are directed to try their cases in the court and not in the press." Id., at 366.

The reason for making such a distinction, said the court, was that lawyers had obligations and duties different from those of ordinary citizens. 8/ These duties were not only to clients but also the court and public, and were designed to insure that the fairness of the judicial process not be impaired by "extraneous influences." One common influence was press conferences called by attorneys seeking pre-trial publicity. Id., at 370. Upholding the right of the state to forbid this, the Court said:

> "Lawyers have First Amendment rights of free speech. They are not second-class citizens. They are first-class citizens with many privileges not enjoyed by other citizens. With privilege, however, goes responsibility, and codes of professional responsibility have traditionally recognized that a lawyer is subject to special disciplinary sanctions when he neglects his responsibility to his clients and to the public. He is equally subject to disciplinary sanctions when he violates his responsibilities to courts, to other litigants and to the public when he invokes extraneous influences to deprive judicial processes of fairness." Id., at 366.

8/ The court, therefore, rejected the claim made by Buchanan in Peck's Impeachment, (Pb14-26).

What the Court identifies here are particular role responsibilities that are imposed by the Disciplinary Rules on attorneys but not on others. Although the primary focus is on the rules adopted by Virginia, the significance of the court's remarks is clear--that it is constitutionally permissible for courts to adopt rules which limit the exercise of free speech by attorneys in order to maintain the integrity of the judicial process. The First Amendment rights allegedly impinged upon are thus made to yield to equally weighty considerations generated by the other responsibilities that bar membership entails.

The full range of free speech regulations on attorneys is undoubtedly impossible to specify in advance. Even so, it is clear that courts are willing to validate such regulations when the speech poses a threat to the administration of justice. Appellant's position, in contrast, is that there must be an actual obstruction of justice before the speech can be punished (Pb10-12).

The many cases discussed in this section clearly demonstrate that disciplinary rules serve primarily a protective not a punishment function. Consequently, to classify speech regulations falling under these rules as aspects of punishment is to miss the obvious distinction between penal and preventive measures. Moreover, if Appellant's position were correct, courts would be powerless to prevent obstructions to justice until after they had occurred. Since a court cannot know in advance what will <u>actually</u> obstruct justice, it must wait until after the event to make its determination.

Yet the very point of the Disciplinary Rules regarding speech is to prevent obstructions before they happen. 9. As the Supreme Court has emphatically stated, "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). This is a clear mandate that the courts can regulate speech within constitutional guidelines to make them consistent with the other responsibilities that attorneys have. The position advanced by Appellant ignores these responsibilities and misinterprets the cases. He advocates a far different right than the case law supports.

9/ An interesting sleight-of-hand occurs in Appellant's argument. His initial position is that only an actual obstruction of justice justifies punishment (Pb-12). As indicated above, this must be determined after the speech or conduct has occurred. However, Appellant later discusses the appropriate guideline for measuring actual obstructions, claiming that it is the "clear and present danger test" (Pb 18). This test, though, is forward looking (i.e., what will obstruct justice). Appellant has thus combined two incompatible standards into one test, making application impossible. See Hirschkop, supra., at 369-70 for a discussion of the single test to be used for both remedial actions (past conduct) and preventive guidance (future conduct).

ARGUMENT

II

THE "REASONABLE LIKELIHOOD" TEST IS THE APPROPRIATE STANDARD FOR REGULATING PUBLIC STATEMENTS BY ATTORNEYS

Appellant is charged with violating DR 1-102(5) and DR 7-107(D). His constitutional challenge to the latter rule is predicated on an interpretation of that rule which is seemingly at odds with the plain language of its formulation. The rule states:

> "During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra judicial statement that he expects to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or othermatters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case."

Appellant's contention is that the standard of speech adopted by this rule is different from that which the Supreme Court held is the constitutionally permissable minimum for public speech regulation. Specifically, Appellant claims that the governing standard is whether the attorney's speech constitutes a clear and present danger to the administration of justice (Pb18-15). The above rule, however, establishes limitations on public communications

that are "reasonably likely" to interfere with a fair trial. The reasonable likelihood test being less stringent than the clear and present danger test, therefore, fails to meet the minimum constitutional standard.

In support of the clear and present danger test as the appropriate standard, Appellant relies on Bridges v. California, 314 U.S. 252 (1941), and the cases generating out of that decision, including Landmark Communications v. Virginia, 435 U.S. 829 (1978). Appellant also approvingly cites Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1973), cert. den. 427 U.S. 912 (1976), a declaratory judgment action in which the Seventh Circuit invalidated disciplinary rules of the United States District Court for the Northern District of Illinois, which had adopted the reasonable likelihood test. The Court there substituted the "serious and imminent threat of interference" standard, a version of the clear and present danger test 10/ because it found that the reasonable likelihood standard "established such a blanket prohibition whereby even a trivial, totally innocuous statement could be a violation." Id., at 251. The Court placed heavy reliance on its prior cases of In re Oliver, 452 F.2d 111 (7th Cir. 1971) and Chase v. Robson, 435 F2d 1059 (7th Cir. 1970) in applying the stricter standard, and concluded that the disciplinary rules were defective because they incorporated the looser and, hence, incorrect test.

10/ The Bauer test is implicit in the clear and present danger test. Brandenburg v. Ohio 395 U.S. 444, 449 (1969).

The reasonable likelihood test, however, has its own pedigree. It was first suggested as the standard for curtailing extrajudicial speech in the recommendations of a report by the American Bar Association's Committee on Fair Trial and Free Press (the Reardon Committee). That Committee, took its cue 11/ from the Supreme Court decision in Sheppard v. Maxwell, 384 U.S. 333 (1965), where it was stated that trial courts "must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." Id., at 363. In particular, courts should not let trials proceed "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial ...." Id., at 363.

The Reardon Committee's recommendations were adopted within DR 7-107 of the ABA's Code of Professional Responsibility in 1969. A year later, the New Jersey Supreme Court adopted them as well, though with some modifications. 12/

The reasonable likelihood test has been upheld by both the Fourth and Tenth Circuits. In United States v. Tijerina, 412 F2d 661 (10th Cir. 1969), cert. den 396 U.S. 990 (1969),

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11/ Reardon Committee Report, at 74.

12/ Appellant claims that adoption of DR 7-107 by this Court was "without substantial change" (Pb21-30). The particular rule at issue here, DR 7-107(D), does contain one change worth noting. In the ABA Code's version, the "reasonable likelihood" test is applied to statements "a reasonable person would expect to be disseminated." In the New Jersey rules, that test is applied to statements that "he [the attorney] expects to be disseminated." The difference in these formulations, though seemingly slight, reflects an interesting difference in application since the New Jersey standard is stricter; i.e., what the individual as an attorney expects to be disseminated. The importance of this stricter standard is discussed below at pp. 57-58.

the Tenth Circuit considered the constitutional challenge to a court order prohibiting public statements which posed a reasonable likelihood of prejudice to the conduct of a criminal trial. The order was attacked on the grounds that it was not based on the proper test, that of a clear and present danger to the administration of justice.

The Court upheld the order claiming that the language of Sheppard made the reasonable likelihood test the appropriate standard. Id., at 667. Moreover, the Court found that the need to balance the First Amendment right to free speech with the Sixth Amendment right to a fair trial was better accomplished using the more relaxed test. This was because the clear and present danger standard gave a preferred position to the First Amendment, a position with which the Court did not agree. 13/ Id., at 667.

A similar result was reached by the Fourth Circuit in Hirschkop v. Snead, supra, a declaratory judgment action seeking to invalidate the Virginia Supreme Court's disciplinary rules governing public statements by attorneys. 14/ There the Court rejected the Seventh Circuit's reasoning in Bauer and held that the reasonable likelihood test better accomplished the tripartite tasks of ensuring a fair trial,

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13/ In Nebraska Press Association v. Stuart. 427 U.S. 539, 561(1976), the Supreme Court emphasized that the First Amendment does not take precedence over the Sixth. "The authors of the Bill of Rights did not undertake to assign priorities as between the First Amendment and Sixth Amendment rights, ranking one as superior to the other ... [I]f the authors of these guarantees ... were unwilling or unable to resolve the issue ... it is not for us to rewrite the Constitution by undertaking what they declined to do."

14/ See pp 19-20 above for other aspects of the Hirschkop case.

guaranteeing free speech to attorneys and holding lawyers to the other obligations required of them as officers of the court. Id., at 362, 366-368.

In reaching its decision, the Court relied on Procunier v. Martinez, 416 U.S. 396 (1974), where the Supreme Court formulated a two-step test for determining the constitutionality of governmental restrictions on free speech. This test requires that the regulation must further an important governmental interest unrelated to the suppression of expression and that the regulation must be no greater than is necessary to the protection of the governmental interest involved. Id, at 413.

The Fourth Circuit determined that the first part of the test was satisfied by the important government interest in assuring every person the right to a fair trial. Supra, at 363. The second part, concerned with overbreadth, was satisfied because the reasonableness standard added clarity to the Disciplinary Rules and made them definite while separating innocuous comments from culpable ones. Id., at 370. In fact, the Court argued that the reasonable likelihood test is a better and more precise standard than that of a serious and imminent threat because it requires less speculation about which comments will adversely affect the administration of justice. Id., at 368. Since the latter test specifies a higher standard to be met before speech can be regulated, it creates considerable uncertainty about whether a particular comment will satisfy its stringent

proscriptions. The reasonable likelihood test, in contrast, does not make such speculative demands. 15/

Although it may seem as if the case law supports each of the competing standards equally well, the cases relied on by Appellant present a less cogent picture than first appears. For one thing, each of the Supreme Court decisions he cites involved newspaper publications and none involved attorneys. This is significant because the obligations on attorneys are different from those on newspapers; in particular, it is the very function of a newspaper to report and comment on controversial issues, while this is at most tangential to the attorney's role where it is not forbidden altogether. The clear and present danger test, historically arising from the punishment of newspapers, thus seems appropriately confined to that context alone. See Comment, 10 Suffolk L. Rev. 654 (1976).

A related consideration distinguishes Hirschkop from Bauer. The latter case fails to acknowledge that an attorney owes a duty to the court as well as to his client. The decision is framed exclusively in terms of the "free press-fair trial" issue. In contrast, Hirschkop explicitly

15/ A similar observation was made by the California Court of Appeals in Younger v. Smith, 30 Cal. App.3d 138, 163-64, 106 Cal. Rptr. 225, 241-42 (1973). There the court, following Tijerina, criticized the clear and present danger standard because it forces a judge "to palm off guesswork as finding." In contrast, the reasonable likelihood test appreciates the appropriate contingencies and "does not demand impossible feats of clairvoyant fact finding."

considers the role of attorneys as officers of the court. In that capacity, "they have very special responsibilities for lending support to maintenance of the integrity of the judicial system." Hirschkop v. Snead, supra, at 370. Recognizing this feature of the attorney's role surely adds an important dimension to considerations of the appropriateness of attorney speech and conduct. The failure to do so considerably weakens any subsequent analysis.

A second weakness in Appellant's analysis of the case law concerns the consistency of the cases he cites. In support of his view that the clear and present danger test is the appropriate standard for regulating speech, Appellant points to Landmark Communications v. Virginia, 425 U.S. 829 (1978), where the Supreme Court reversed a newspaper's criminal conviction for divulging confidential information about an investigation into the conduct of a state judge. The Court there held that the clear and present danger test had simply not been satisfied, Id, at 845, and Appellant concludes that this holding reaffirms the vitality of that test.

A close reading of Landmark Communications indicates, however, that such a conclusion is unwarranted. Although the Court quotes Bridges approvingly, the Court also says that the clear and present danger test is neither "a technical legal doctrine" nor "a formula for adjudicating cases." Id, at 842.

> "Properly applied, the test required a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed." Id., at 842-43.

The Court's emphasis on the clear and present danger test as a balancing of competing interests shows that the test is not meant to be applied mechanically. Indeed, the Court reverses the conviction of the newspaper solely on the grounds that the Virginia Supreme Court abrogated its responsibilities to determine for itself whether the publication actually created the threat for which the newspaper was punished. Id., at 844. Having deferred to a legislative judgment that this was the appropriate standard to apply, the Virginia Court failed to consider the particular circumstances surrounding the newspaper article. The Supreme Court's refusal to uphold the punishment is not, therefore, an unequivocal endorsement of the clear and present danger test. It is merely the Court's determination that this is one measure of speech regulation which has not been satisfied in this case. It does not preclude the possibility that other measures or standards are available as well.

Not only is the federal case law unsupportive of Appellant's position. So, too, is the "Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the 'Free Press-Fair Trial' Issue." 87 F.R.D. 519 (1980). In that report, a committee of federal

judges 16/ examined the existing guidelines and suggested various revisions of the standards for regulating public statements made by attorneys during trials in the federal courts. After surveying the Supreme Court and lower federal court decisions in this area, the Committee recommended that the current standard of regulation, whether the speech poses a reasonable likelihood of interference with a fair trial be retained.

> "[T]he reasonable likelihood standard is an appropriate standard for use in regulating attorney comment in criminal maters... The standard, together with the explicit rules that follow it, suffices to inform attorneys of what they may or may not say for publication regarding imminent or pending criminal litigation in which they are involved." 17/ Id., at 523-24.

Significantly, the Committee suggested retention of the reasonable likelihood standard based on the Sheppard, Tijerina, Hirschkop lines of cases, Id., at 527, and despite the fact that the ABA's proposed Model Rules of Professional Conduct (1981) recommended the clear and present danger test as the new standard to govern attorney comments. Id., at 528. 18/

16/ The Committee was chaired by Judge Collins Seitz, Chief Judge of the Third Circuit Court of Appeals.

17/ In the formulation of the actual rule, the Committee makes it clear that the term "involved" means "being associated with" the prosecution or defense. Id., at 526.

18/ The Committee also noted that courts in the Seventh Circuit were governed by the decision in Bauer. Id., at 528.

State courts that have considered the question of which standard to apply have favored the reasonable likelihood test as well.

In State v. Ross, 36 Ohio App.2d 185, 304 N.E.2d 396 (Ct. App. 1973), app. dism., 415 U.S. 904 (1974), the Ohio Court of Appeals reviewed a decision of a municipal court which had refused to permit William Kunstler to appear before the court pro hac vice in a criminal trial. The court's concern was with Mr. Kunstler's out of court conduct and he was questioned about the standard he used in determining the propriety of public statements concerning a trial. Kunstler said he would abide by the clear and present danger test announced in Chase v. Robson, supra, by the Seventh Circuit. The Appellate Court determined that DR 7-107, adopted by the Supreme Court of Ohio, employed the reasonable likelihood standard and that the trial judge's denial of the pro hac vice motion was supported because Kunstler would not abide by it. Id., at 195-200, 304 N.E.2d at 403-06. The court stated that DR 7-107 was a "constitutionally valid regulation of the conduct of attorneys with respect to out of Court statements concerning pending litigation. Id., at 195-96, 304 N.E.2d at 403-04. The court concluded that the rule seemed to be required by Sheppard v. Maxwell, supra, Id., at 196, 304 N.E.2d at 404.

In Widoff v. Disciplinary Board, etc., 54 Pa. Comm. Ct. 124, 420 A.2d 41 (Commw. Ct. 1980), the Commonwealth Court of Pennsylvania held that the reasonable likelihood test was

the appropriate standard under DR 7-107(H) governing attorneys' statements during the pendency of administrative hearings. The Court extended the reasoning of Sheppard and Hirschkop beyond the context of a criminal prceeding in order to ensure the fairness of any tribunal. Id., at 134, 420 A.2d, at 45. In doing so, the Court rejected a vagueness challenge on the grounds that free speech can be restricted in order to assure a fair trial. An overbreadth argument also failed because the Court felt due process rights take precedence over the rights of free speech. Id., at 131-34, 420 A.2d, at 44.

Finally, in Markfield v. Ass'n. of Bar of City of New York, 49 App. Div.2d, 370 N.Y.S.2d 82 (App. Div. 1975), app. dism. 37 N.Y.2d 794, 337 N.E.2d 612, 375 N.Y.S.2d 106 (1975), the Appellate Division of the Supreme Court of New York dismissed disciplinary sanctions against an attorney who had participated in a radio talk show during a trial. Although the Court held that it would restrict the application of DR 7-107(D) to statements that present a clear and present danger to the administration of justice, the Court conceded that the reasonable likelihood standard might also be constitutional. Id., at 517, 370 N.Y.S.2d at 85. Under neither standard, however, did the attorney's conduct actually justify discipline. Id., at 517, 370 N.Y.S.2d at 85.

While it is Appellant's position that the reasonable likelihood test is "constitutionally infirm," it is clear from the foregoing discussion that few courts would agree.

Only one court has explicitly adopted that view with regard to attorneys, but in doing so, has failed to consider the attorney's responsibility to the court and public (Bauer). Even a court which applied the clear and present danger test to attorneys practicing before it nevertheless acknowledged that the reasonable likelihood test is constitutional (Markfield).

In contrast, the reasonable likelihood test has been adopted by two federal circuits (Tijerina; Hirschkop) and by lower courts in Ohio (Ross) and Pennsylvania (Widoff). It is also the prevailing federal judicial view as evidenced in the Revised Report of the Judicial Conference. Finally, and most significantly, it is the standard which the Supreme Court specifically said is the best suited for the avoidance of prejudicial interference with the administration of justice (Sheppard). 19/

Of course, it is possible that the controversy between these competing standards is merely one of semantics and not of a constitutional dimension. Hirschkop v. Snead, supra, at 368 (fn. 13). See also "A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation," 65 Corn. L. Rev. 1106 (1980). Appellant vigorously disputes this possibility (pb18-21). Yet it is impossible to enumerate every example where an attorney's public comments

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19/ Again, see Hirschkop v. Snead, supra, at 369 for an analysis of future oriented, preventive measures that a court may adopt to protect the integrity of its processes.

pose either a serious and imminent threat or a reasonable likelihood of interference with a criminal trial. Clearly, some standard is necessary to afford attorneys notice of what speech may be proscribed, but whatever test is used, a residue of uncertainty will remain. Nevertheless, as the Fourth Circuit said in Hirschkop, "No heavier or stiffer standard than the reasonable likelihood test is needed to protect [attorneys] from disciplinary sanctions for speech for publication without adequate notice of the consequences." Id., at 369.

Contrary to Appellant's assertion, there is ample authority for upholding the constitutionality of the reasonable likelihood standard of DR 7-107(D).

ARGUMENT

III

DR 7-107(D) CAN PROPERLY BE APPLIED TO APPELLANT'S COMMENTS

An important issue related to the question of the appropriate standard of speech regulation is whether the the disciplinary rules governing such regulation are meant to apply to Appellant at all. Appellant raises a number of different arguments designed to show that DR 7-107(D) is inapplicable to his comments. These arguments, however, are unpersuasive.

Appellant's first claim is that DR 7-107(D) was never intended to apply to critical comments about a judge because they were developed to meet different needs. (Pb30-12) Specifically, he claims that the rules were designed to curb trial by the press in which previously unrevealed facts could result in a prejudicial proceeding. His comments, he concludes, simply do not fall within that category.

The underlying assumption of Appellant's position is that his critical comments about Judge Appleby were not directed to the merits of either sides' respective cases but rather were designed to expose the political motivation (i.e. racism) by which the judge was conducting the trial. This is why Appellant claims he was speaking in his capacity as Director of the National Conference of Black Lawyers on behalf of the defendant. (Pb5-7)

Appellant is no doubt correct that much of the concern expressed by the Reardon Committee in its initial recommendations of disciplinary rules governing the free press-fair trial issue was directed towards

controlling revelation of certain facts in the press prior to their admission at trial. However, this was not the only problem that that Committee addressed. Also of concern was the problem of defense counsel trying "to put his case before the public and to create a sympathetic audience." Reardon Committee, supra. at 37.

A sympathetic audience is not created solely by the presentation of one side's factual case. It can also result from a campaign in which the official fact-finding process itself is cast into doubt. In this way a lawyer can affect public opinion by arguing that whatever facts are adduced at trial are tainted by the very process of evaluation (i.e. the trial). Sympathetic prejudices are generated out of a belief that a fair trial is impossible because the conduct of the trial is biased. While perhaps less frequent than the extrajudicial revelations of facts about the accused, it is certainly of equal significance. Id., at 37.

There can be little doubt that it was Appellant's goal to create such sympathies on behalf of Joanne Chesimard. By his criticism, Appellant hoped to influence public opinion against Judge Appleby and the conduct of an ongoing trial. His statements inpugning the judge's integrity and impartiality were not made in isolation, or as part of some generalized attack on the judiciary. They were made in the context of a criminal proceeding. At that point, the case had gained considerable publicity and Appellant's aim was to use that publicity to arouse public suspicion about the defendant's receiving a fair trial before that judge. His comments were directed against a particular judge for a particular reason. Moreover, potential jurors were exposed to these comments since they were widely reported in the press and on public television. Who is

to say that a juror would not be prejudicially influenced by an accusation that the trial judge is biased? It is therefore disingenuous for Appellant to portray his comments as simply an expression of his views about Judge Appleby's racial sensitivities. (Pb11-4) They were calculated to convey the belief that the criminal defendant was before a biased judge, and thereby to influence public opinion against the trial.

That a court can protect itself from prejudicial interferences of this sort is implicit in the language of Sheppard. The conclusion is reinforced by recognition of the fact that the state, as well as the defendant, is entitled to a fair trial. United States v. Tijerina, supra., at 666; State v. Carter, 143 N.J. Super. 405, 407-08 (App. Div. 1976), rev'd on other grounds, 71 N.J. 348 (1976). Comments by the defense critical of the impartiality of the trial judge will naturally raise doubts about the merits of the state's case. Certainly, here, Appellant's comments were designed to adversely affect the state's case by arguing that the judge was biased against the defendant. The inability or failure of the court (or disciplinary rules) to proscribe such statements therefore deprives the state of its rights. As this Court has stated:

> "The ban on statements by prosecutors and his aides applies as well to defense counsel. The right of the state to a fair trial cannot be impeded or diluted by out of court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the state are impermissible." State v. Van Duyne, 34 N.J. 369, 389 (1964), cert. den. 380 U.S. 987 (1965). 20/

20/ See also, In re Bailey, 57 N.J. 451, 455 (1971) where the Court suspended an attorney's privilege of applying for pro hac vice admission because of his attempt to bring about "a non judicial pretrial determination by the public of his client's innocence." The Court held this violative of Canon 20, the forerunner of DR 7-107.

Appellant's interpretation of the scope of DR 7-107(D) misses this point entirely. Yet it is hardly surprising, given the characterization of his comments as "mere criticism" of the trial judge. Such a characterization, however, divorces Appellant's statements from the context in which they were made. 21/ Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969). The criticism was designed to affect the trial by influencing public sentiment against Judge Appleby. Surely it would be odd for the disciplinary rules to encompass proscriptions on extra-judicial comments about factual issues, but not about other matters which equally threaten the administration of justice. Calling a press conference to denounce the trial judge in a pending criminal matter can certainly result in the denial of a fair trial. Whether it actually does so is irrelevant for purposes of the disciplinary rules. 22/ Appellant used the news media in an attempt to prejudicially

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21/ In the Report of the Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct (1981), it is emphasized that whether a particular statement is violative of the disciplinary rules "depends upon all the surrounding circumstances." Amongst the suggested factors to be used in making this determination are the nature of the statement and its timing, the extent to which the information has previously been circulated, the nature of the proceeding, and its vulnerability to prejudicial influence. Under these criteria, it is certainly possible to find Appellant's comments falling with the proscriptions of DR 7-107(D). Interestingly, Appellant approvingly quotes from this section of the Report in his discussion of facial overbreadth without appreciating its significance for his own conduct.

22/ Hence, Judge Appleby's assertion that Appellant's statement had "no impact" on the trial is not dispositive of whether Appellant is guilty of an ethics violation. (Pb36-18) The reasonable likelihood that a statement will interfere is all that is required.

influence the judicial process. This is precisely what DR 7-107(D) is designed to prevent.

The Court's language in Van Duyne makes it unmistakably clear that defense attorneys cannot use the press to try their cases. DR 7-107(D) expands this proscription to forbid "a lawyer or law firm associated with the prosecution or defense" from doing so as well.

Appellant's second argument is that he was not associated with the defense and hence, cannot be disciplined under that rule. (Pb33-11) At the outset it is important to note that there are apparently no cases dealing with the constitutionality of the "associated with" phrase of DR 7-107(D). Appellant obscures this fact in his discussion of the facial unconstitutionality of the disciplinary rule (Pb45-17), by pointing to the Seventh Circuit's holding that the "associated with" language is unconstitutionally vague when applied to lawyers other than prosecutors during the investigatory stage. Chicago Council of Lawyers v. Bauer, supra., at 252. However, that Court emphasized that the investigatory stage was not part of the judicial process and that it was at the trial where protection was needed. Id., at 253. Although questions were raised as to who was possibly covered by the "participating in or associated with" language, the Court was more interested in the undue restraint on an attorney's free speech before the judicial process was formally commenced or a decision was made by the prosecutor to prepare the case for trial. 23/ Indeed, when

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23/ The court also noted that prior to the filing of formal charges statements by an attorney on behalf of a client under investigation would not be prejudicial to the government's case. Thus, the court implicitly recognized the state's right to a fair trial.

the Seventh Circuit addressed the constitutionality of DR 7-107(D), covering extra-judicial statements made during jury selection and trial, the Court never mentioned that the "associated with" phrase was unconstitutional at that stage of the proceeding. Id., at 255-57.

In the absence of any clear constitutional guidelines this Court is therefore free to interpret this portion of the disciplinary rule as it sees fit. It is the suggestion of the Revised Report of the Judicial Conference Committee, though, that the phrase should be interpreted broadly. 87 F.R.D. at 527.

Appellant's refusal to cooperate with the investigation of the Middlesex County Ethics Committee is a major stumbling block in deciding whether or not he was associated with the defense team at the Chesimard trial. Under procedures established by this Court the intital responsibility for making findings of fact in disciplinary matters lies with the District Ethics Committees (formerly the County Ethics Committees). R. 1:20-2(h)(k) [formerly R. 1:20-2(a)]. Such findings are reviewable by the Supreme Court. In re Thompson, 67 N.J. 26 (1975); Matter of Loring, 73 N.J. 282 (1977).

Appellant's actions have effectively prevented the Ethics Committee from doing its job. He simply refused to participate in any part of the investigation, and he never filed an answer required by R. 1:20-4(c) [now R. 1:20-2(j)]. Nevertheless, there is still a strong prima facie case for claiming Appellant was associated with the defense. By his own admission Appellant held himself out as a spokesman for the defendant Chesimard (Pb5-5). 24/ Having represented her before the federal courts regarding the conditions of her pre-trial confinement, Appellant held a press conference at which he criticized

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24/ The Daily News article describing Appellant's speech referred to him as one of Joanne Chesimard's lawyers, and the speech as being made on behalf of the defense team.

aspects of the state proceeding. 25/ (Trial Transcript, 200a). (Appendix A.) He provided the defense team with copies of his pleadings in the federal matter as part of their application to stay jury selection in the state case. (Trial Transcript, 204a). He also allowed the defense team to use his office and facilities. (Trial Transcript, 205a). Finally, and most significantly, his name appears as a defense attorney in the trial court's records on at least four dates. (Appendix B). 26/

Appellant asserts that he had "no actual relationship" to the Chesimard murder trial. (Pb45-8) Certainly his actions on behalf of the defendant materially assisted the defense team. Whether such assistance constitutes an association with the defense is unclear. Had the Middlesex County Ethics Committee been allowed to complete its investigation then perhaps this issue would have been resolved. Still, there is prima facie evidence of a connection between the defense team and Appellant, and undisputed evidence that Appellant made the public comments charged to him. The rule authorizing

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25/ Appellant testified before Judge Fisher of the Federal District Court that in calling the press conference he did not consider whether his comments would create confusion about his role in the Chesimard case. (Trial Transcript, 200a)

26/ Appellant claims that the testimony of Judge Appleby shows that he was not counsel in the Chesimard murder trial. The court records indicate that of the four appearances by Appellant only one was before Judge Appleby. The others were before Judges, Cohen (8/11/76), Demos (9/20/76), and Bachman (5/14/74).

investigation of an ethics complaint requires no more. R. 1:20-2(k) [formerly R. 1:20-2(a)].

From the very beginning of the ethics investigation, Appellant has attempted to thwart the procedures which would enable this Court to determine the factual question that Appellant so confidently answers for himself. Far from enabling the Ethics Committee and the Court to determine the association between Appellant and the defense team, Appellant has sought to show a conspiratorial connection between the trial judge, prosecution, Ethics Committee and the Supreme Court of New Jersey. This was the basis of his federal court proceeding to obtain an injunction against the ethics investigation. In fact, Appellant so twists the issue that he makes it appear as if the Ethics Committee had absolutely no basis for beginning an investigation at all. In his statement of facts (Pb7-14 through 8-10) Appellant quotes from the testimony of David M. Foley, Esq., the Ethics Committee member responsible for the investigation, that no one other than the newspaper reporters were contacted in the initial stages of the investigation. Yet, the context of that testimony reveals that Mr. Foley was responding to the question of whether there was any bad faith on the part of the Middlesex County Ethics Committee in initiating the investigation. Mr. Foley's testimony establishes that there was no bad faith because he did not contact anyone who was a participant in the trial. Appellant uses this testimony to conclude that the investigation was, at best, incomplete. Surely, whatever factual issues are incomplete are due solely to Appellant's own conduct in avoiding or ignoring the procedures by which the facts could be revealed.

Appellant's argument that the disciplinary rules are unconstitutional as applied is pure bootstrapping. He hides behind his own avoidance of the disciplinary procedures in order to claim that the factual record does not support application of the disciplinary rules to his case. If this Court should declare that the rules are constitutional on their face perhaps Appellant's case should be remanded to another ethics committee for a full factual determination. This Court has recommended a similar procedure in other matters involving unconstitutionality-as-applied. Piscataway Associates, Inc. v. Piscataway Township, 73, N.J. 546 (1977). The high standard of proof required to sustain a finding of a disciplinary violation ensures that the issue will be treated fairly. In re Sears, supra.

The foregoing discussion also disposes of Appellant's third argument, that DR 7-107(D) functions as a per se proscription on speech. The evil of a per se rule is that it "establishes a violation without regard to an individualized determination in a particular case that the comment in question" threatened some obstruction. (Pb35-3) Appellant argues, presumably, that the requisite individualized determination has not occurred in his case.

Again, Appellant seeks to find a defect in the disciplinary rules based on his own avoidance of the disciplinary procedures. Had Appellant filed an answer to the charges, or otherwise cooperated with the ethics investigation, then there certainly would have been a factual determination as to whether his particular conduct constituted a reasonable likelihood of interference with the administration of justice. That there has been no finding so far is due wholly to

Appellant. It is therefore ironical for Appellant to quote from cases condemning per se proscriptions (Pb35) when each of those cases makes quite clear that there must be an opportunity to prove that a particular statement did not constitute an interference. Appellant is the party who repeatedly rejected that opportunity; the rules clearly provide for it. 27/

Appellant's final argument purporting to show that DR 7-107(D) would be unconstitutional if applied is that another rule, DR 8-102(B), already encompasses criticism of a judge. Hence, the former rule is not designed to censure critical comments by a lawyer. (Pb33-4)

This argument assumes that there neither is, nor can be, any overlap between different disciplinary rules; that because one rule addresses a particular problem another cannot do so as well. Such an assumption is completely unwarranted. Virtually every rule under DR 1-102 (Misconduct) has one or more specific counterparts in later sections of the disciplinary rules. Violating the more specific rule gives rise to a violation of one or another of the generalized misconduct rules also. For example, DR 1-102(A)(4) forbids a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. DR 7-102(A)(3) details specific acts of dishonesty or deceit that a lawyer must not engage in while representing a client. A lawyer who violates one of the specific proscriptions of DR 7-102(A) also violates DR 1-102(A)(4) for precisely the same conduct. Indeed,

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27/ An unstated premise of Appellant's postion is that an ethics investigation is equivalent to the finding of an ethics violation. These are certainly different, with the high standard of proof resulting in the dismissal of most ethics complaints.

even some of the more specific rules can overlap, e.g. DR 7-102(A)(1) and DR 7-106(C)(2). Thus, it is purely specious for Appellant to argue that the application of one disciplinary rule to a particular problem precludes application of any other rule. Redundancy does not imply a constitutional deficiency.

Moreover, Appellant's argument again ignores both the purpose and context of the critical comments. They were designed to have an impact upon a criminal trial then in progress. Characterizing them as "pure criticism" obscures this feature of the speech. As demonstrated earlier, DR 7-107(D) is the proper disciplinary rule for charging Appellant. What Appellant's argument shows, perhaps, is that he should be charged with an additional ethics violation by this Court. In re Loring, 73 N.J. 282 (1973); In re Thompson, 67 N.J. 26 (1975); In re Kamp, 40 N.J. 588 (1963).

Finally, even if Appellant has been incorrectly charged, that has no effect on whether he can be disciplined. This Court has held that so long as the complaint in a disciplinary matter specifies the facts giving rise to the complaint, it is not necessary to specify the particular rules allegedly violated. 28/ In re Kamp, supra., at 598. Other courts are in agreement with this position. See, generally, 7A C.J.S. "Attorney and Client" §96 (1980). In fact, the Court's disciplinary powers extend beyond the confines of the disciplinary rules. Thus, an attorney can be guilty of unethical conduct even if the conduct does not violate a specific provision of the Code. In re Russell, 59 N.J. 315 (1971); In re Mattera, 34 N.J.

28/ The Court Rules now apparently require specification of the disciplinary rule violated. R. 1:20-2(i). However, the Rules governing ethics proceedings at the time this matter arose did not have such a requirement. R. 1:20-4(a) (1977).

259 (1961).

Appellant's arguments against the applicability of DR 7-107(D) fail on four separate grounds:

a) the rule was designed to prevent prejudicial interference with a trial, which was the purpose of Appellant's comments;

b) the rule reaches attorneys associated with the defense and there is prima facie evidence that Appellant was so associated. Appellant's own lack of cooperation with the ethics investigation is the reason why the full details of that association are not yet known;

c) the rules is not a per se proscription. Appellant had an opportunity to demonstrate that his speech did not violate the ethics rule, but he rejected that opportunity.

d) the purported overlap with DR 8-102(B) does not invalidate the rule since the disciplinary rules contemplate that multiple rules may apply to a single situation.

For the foregoing reasons, it can be concluded that DR 7-107(D) is constitutional as applied to Appellant.

ARGUMENT

IV

DR 1-102(A)(5) IS CONSTITUTIONAL AS APPLIED AND ON ITS FACE

Appellant's argument against the constitutionality of DR 1-102 (A)(5) as applied, is identical to that of his argument against the application of DR 7-107(D), and can be disposed of in the same way. Specifically, that it is not a constitutional infirmity for disciplinary rules to overlap in their coverage of particular problems. As indicated, supra. p. 45, the specific rules of latter sections of the Code of Professional Responsibility often overlap with the more general proscriptions of DR 1-102. Certainly, this Court has never held such overlap was impermissible. [See, generally, In re Rabb, 83 N.J. 109 (1980); In re Clark, 83 N.J. 458 (1980), for two cases, among many, where an attorney was disciplined for violating multiple Code provisions - both general and specific - arising out of a single transaction.] The fact that the proposed changes in the Model Rules would do away with DR 1-102(A)(5) because of redundancy is therefore irrelevant. Redundancy is simply not a constitutional defect.

The main challenges to the facial constitutionality of DR 1-102 (A)(5) have centered on the issue of vagueness. In Grayned v. City of Rockford, 408 U.S. 104 (1972), the Supreme Court laid down general guidelines for ensuring that adequate notice of proscribed conduct is provided before fundamental liberties are infringed. Specifically, the Court required that laws or regulations "give the person of ordinary intelligence a reasonable opportunity to know what is proscribed," and that there should be safeguards to prevent discriminatory and arbitrary application by enforcement officials. Id., at 108-109.

Appellant claims that DR 1-102(A)(5) is inadequate on both grounds. However, he fails to provide any reason for this claim,

finding it unnecessary to even argue the point. (Pb45-29) This disciplinary rule, he says, "is perfectly acceptable as a hortatory expression; it is simply not an enforceable regulation." (Pb45-32)

Courts which have ruled on the vagueness challenge to DR 1-102(A)(5) have reached precisely the opposite conclusion.

In State v. Nelson, supra., the Supreme Court of Kansas held that the phrase "prejudicial to the administration of justice" in DR 1-102(A)(5) was not unconstitutionally vague as applied to an attorney who was sanctioned for critical comments after disposition of a case in which he was a party. The Court found that there was no impermissable chilling of the attorney's first amendment rights of free speech because an attorney's right of free speech is tempered by an obligation to the courts and the bar. Id., at 640, 504 P.2d at 214. The attorney was not disciplined, however, because he was a party to the suit and the case had ended. In addition, the attorney did not seek the interview, but rather was sought out by a reporter immediately after the unfavorable decision.

In a subsequent case, State v. Martindale, 215 Kan. 667, 527 P.2d 703 (Kan. 1979), the Supreme Court of Kansas relied on Nelson in dismissing the respondent attorney's contention that DR 1-102(A)(5) was unconstitutionally vague. With respect to the respondent's argument that the rule denied him adequate notice of the charges against him, the Court relied on its decision in State v. Alvey, 215 Kan. 460, 524 P.2d 747 (Kan. 1974) where it was held that "so long as proper notice is given of the basic factual situation out of which the charges might result," the respondent is given sufficient notice of the allegations of misconduct. 29/ Id., at 466; 524 P.2d at 252.

29/ Martindale involved disciplinary proceedings against an attorney who told two prosecution witnesses that they need not appear in the courtroom when the attorney knew the court was waiting for them.

The Court of Appeals for the District of Columbia has also relied upon Nelson in holding that the "prejudicial to the administration of justice" language of DR 1-102(A)(5) was constitutional. Matter of Keiler, 380 A.2d 119 (D.C. 1977). The court found the vagueness challenge to be without merit because the language of the rule was clear. Id., at 126. The court applied the vagueness standard enunciated in United States v. Harris, 347 U.S. 612 (1954) which requires that the rule provide a person of ordinary intelligence a fair notice that the contemplated conduct is forbidden by the rule. The Keiler court cited Nelson and Martindale in upholding the constitutionality of the "prejudicial" language in the rule and stated that:

> "[T]he rule was written by and for lawyers. The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen." 380 A2d. at 126.

The Supreme Court of Oregon in Complaint of Rook, 276 Or. 695, 556 P.2d. 1351 (Or. 1976) found that DR 1-102(A)(1) and (5) were sufficiently definite for the purpose of a professional disciplinary proceeding, which was not a criminal proceeding. The Court stated that the technical safeguards designed to protect the liberty interests of citizens are not relevant to a disciplinary action. The court noted, however, that no first amendment rights were at issue in this case, where a prosecutor's refusal to enter plea negotiations with a certain attorney deprived that attorney's clients of their right to counsel of their choice.

In Howell v. State, 559 S.W.2d. 432 (Tex. Ct. App. 1977), the Texas Court of Appeals relied on Nelson and Rook in upholding the constitutionality of DR 1-102(A)(5) against a vagueness challenge. The court found that all the actions proscribed by the rule would be too numerous to list, but by looking at definitions of "prejudicial"

and "administration of justice", a court could conclude whether or not an attorney's conduct violated the rule. Id., at 432.

Similarly, in Committee on Professional Ethics v. Durham, 279 N.W.2d 280 (Iowa 1979), an attorney challenged the constitutionality of DR 1-102(A) and the Ethical Considerations 1-5 and 9-6 [30/] because a person of ordinary intelligence did not have a reasonable opportunity to know what conduct is prohibited. The court rejected this contention reasoning that:

> "constitutional muster is passed where the meaning of the words can be fairly ascertained by referring to similar statutes, prior judicial determinations, the common law, the dictionary or the words themselves where they have a common and generally accepted meaning." Id., at 283, quoting Matter of Frerichs, supra.

After considering that the code was written by lawyers for lawyers and that it was impossible to cover all professional activity in a specific set of rules, thus necessitating broader standards, the court found that although a "reasonable person" might not understand what conduct was proscribed a "reasonable attorney" would so understand. Id., at 284. The court therefore adopted the "reasonable attorney" standard in upholding the constitutionality of the disciplinary rules.

In addition to the foregoing cases, courts have upheld the constitutionality of DR 1-102(A)(5) even where the disciplinary violation arose from engaging in criminal activity. Office of Disciplinary Counsel v. Campbell, 463 Pa. 472, 345 A.2d. 616 (Pa. 1975), cert. den. 424 U.S. 926 (1976).

From an examination of the foregoing cases, it appears that courts are reluctant to find DR 1-102(A)(5) unconstitutionally vague. In upholding the rule, courts first find that attorneys are subject to different standards than non-attorneys. Courts have considered that

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30/ E.C. 1-5 calls upon an attorney to be "temperate and dignified", while E.C. 9-6 prohibits conduct indicating professional impropriety or the appearance thereof.

(1) an attorney is not subject to the same vagueness standard as an ordinary person because the attorney's first amendment rights are tempered by an obligation to the courts and the bar (Nelson); (2) the disciplinary rules were written for attorneys by attorneys and the nature of the profession makes it impossible to list all conduct of attorneys that may be proscribed (Martindale, Howell, Durham); (3) an attorney has case law, statutes, dictionaries, etc. to assist him in determining if his conduct may subject him to disciplinary proceedings, and therefore has sufficient notice of what conduct is proscribed (Durham); (4) finally, courts have distinguished disciplinary from criminal proceedings and have thereby loosened the more stringent safeguards that the latter proceedings require (Rook).

Much of what the courts say in rejecting vagueness challenges to DR 1-102(A)(5) has particular application to this case. Appellant's comments were deliberate, calculated criticisms of a trial judge made during a press conference called by Appellant. They were not momentary spontaneous outbursts, made in the heat of litigation, to media representatives who sought Appellant's opinions. Appellant thus had ample opportunity to investigate the limitations imposed by disciplinary rules on his comments prior to his press conference. Moreover, as an attorney, Appellant presumably had the means of conducting such an investigation. His failure to do so is attributable to him alone. It is not, therefore, a reflection on DR 1-102(A)(5) that Appellant now finds himself charged with a disciplinary violation. Minimal efforts on his part would have provided him with the notice he claims is lacking in the rule.

In addition to the vagueness challenge to the constitutionality of DR 1-102(A)(5), Appellant also claims that that rule is unconstitutionally overbroad. The claim is based on the belief that the rule sweeps within

its ambit protected as well as prohibited speech (Pb40-16).

The important assumption Appellant makes in asserting the overbreadth claim is that statements critical of a judge cannot be constitutionally proscribed. Argument I, supra, of this brief demonstrates that the constitutional right to criticize a judge is far less expansive than Appellant believes. Argument III, supra, shows that Appellant's description of his comments as "mere criticism" of the trial judge fails to accurately characterize the context and purpose of his statements.

Nevertheless, Appellant can raise an overbreadth challenge even if his own comments are not within the core of speech protected by the First Amendment. Gooding v. Wilson, 405 U.S. 518 (1972). In order to prevail against such a challenge, the state must show that there is a compelling state interest served by the rule or regulation and that this interest clearly outweighs the personal liberties which are suppressed by the effort to accomplish it. Shelton v. Tucker, 364 U.S. 479 (1960). These constitutional guidelines are explicitly recognized in New Jersey. New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 82 N.J. 57 (1980).

There is little doubt that DR 1-102(A)(5) serves a compelling state interest. As this Court has repeatedly stressed, professional discipline is primarily for the protection of the public. See Argument I, supra., at 6. Since the Court has the ultimate responsibility for ensuring the fitness of those practicing law within the state, its promulgation of disciplinary rules to serve as mandatory guides infuses those rules with the requisite degree of importance.

Moreover, in the context of this case, there is another compelling state interest; that of ensuring a fair trial. Virtually every court which has ruled on the free press-fair trial issue has emphasized the

compelling interest the state has in conducting trials. Sheppard v. Maxwell, supra., at 362. Indeed, some courts even claim that a fair trial is a more compelling interest than free speech, and hence, is more deserving of protection. United States v. Tijerina, supra., at 667. Yet whatever the relationship is between these often competing values, it is beyond dispute that the states have a compelling interest in the preservation of the fairness of their trials.

DR 1-102(A)(5) speaks directly to this interest. There can be hardly anything which is more prejudicial to the administration of justice than a trial which is not fair. There are, no doubt, many sources of prejudicial influence. As courts frequently note, however, it is almost impossible to catalogue all of them. State v. Nelson, supra., at 639 ; Howell v. State, supra., at 436 . Certainly, a broad proscription is better than none at all. So long as a limiting construction can be supplied which will demarcate permissable speech from prejudicial influences, the rule will survive constitutional muster. New Jersey Chamber of Commerce v. New Jersey Law Enforcement Commission, supra., at 75.

Can such a limitation be provided? Appellant believes not, though he provides absolutely no reason for his belief. After recognizing that a court can choose between complete constitutional invalidation of a rule or regulation, or the performance of "judicial surgery" to save parts of it, Appellant simply claims that the former approach is preferrable (Pb43-8).

Surely, a court ought to take the more drastic measure sparingly. Two Guys from Harrison Inc. v. Furman, 32 N.J. 199,223 (1960); State v. Profaci, 56 N.J. 346, 350 (1970). As the court stated in Profaci, "it is the duty of this Court to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation."

Id., at 350 (upholding the constitutionality of a section of a disorderly person statute regulating speech against vagueness and overbreadth challenges).

If this Court decides that DR 1-102(A)(5) needs to be more precisely limited, then it is the perogative of the Court to determine how this should be accomplished. Certainly, the latter and more specific sections of the Code modify its general provisions and provide some guidance as to what is prohibited. The unique access that attorneys have to case law, statutes, dictionaries, etc., further provides a way for attorneys to determine for themselves what they are forbidden from doing. In reality, the Court can hardly provide any more guidance without emasculating the rule. Other courts which have faced the issue have realized this limitation and have upheld its constitutionality. This Court should do the same.

ARGUMENT

V

DR 7-107(D) IS CONSTITUTIONAL ON ITS FACE

The principal challenge to DR 7-107(D) is again on grounds of vagueness. Both the ABA and the New Jersey versions of the rule contain the phrase, "that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial." Appellant attacks this portion of the disciplinary rule, citing both Bauer, supra, and Hirschkop, supra, for the holding that the "other matters" language is unconstitutionally vague (Pb44-27).

Appellant is correct that the Seventh Circuit in Bauer and the Fourth Circuit in Hirschkop found that some specific language of DR 7-107(D) was vague. In the former case, the Court could not envision an instance where an extra judicial statement, other than one relating to the trial, parties or issues would pose the requisite threat of interference with a fair trial. Chicago Council of Lawyers v. Bauer, supra., at 255-56. The latter court expressed concern that the "other matters" proscription could become a trap for the unwary. Hirschkop v. Snead, supra, at 371.

Significantly, neither court provided much case law support for their holdings. Instead, the courts relied on an intuitive sense that the phrase was unconstitutionally vague.

One court which has rejected a similar conclusion is the Commonwealth Court of Pennsylvania, in Widoff v. Disciplinary Board, etc., supra. There, the court was asked to consider the constitutionality of DR 7-107(H) dealing with attorney's statements during the pendency of an administrative hearing. A specific section, DR 7-107(H)(5),

proscribed statements about "any other matter reasonably likely to interfere with a fair hearing". Applying the vagueness standard set forth in Grayned v. City of Rockford, supra., the court recognized the difficulty of establishing a rule broad enough to cover diverse factual situations while still meeting constitutional tests. Nevertheless, the court found that subsections 1 through 4 of DR 7-107(H) provided examples of statements likely to interfere with a fair hearing, and that by coupling these examples with the policy and ethical considerations underlying the disciplinary rules an attorney was afforded notice of what statements were proscribed. Id., at 135-38; 420 A.2d at 46-47.

The reasoning of the Widoff court can be easily applied to DR 7-107(D). The other sections of DR 7-107 provide detailed areas in which public comments by attorneys are proscribed. While these areas generally concern the extra-judicial revelation of facts prior to trial, the underlying policy is to protect the rights of both the accused and the state from a trial by the press. The specific proscriptions of the other sections of DR 7-107, referring to the trial, parties, or issues can be incorporated to clarify the "other matters" language by providing examples of the types of statements proscribed by DR 7-107(D). These examples need not be exhaustive of every possible situation, and when combined with the case law and disciplinary decisions of other jurisdictions, should provide reasonable guidelines for an attorney to determine what is permissible from what is prohibited.

Under the New Jersey disciplinary rules, there is perhaps an even stronger reason for holding that DR 7-107(D) is not unconstitutionally vague. Unlike the ABA standard or the codes adopted by most other states,

the New Jersey rule prohibits extra-judicial statements that the individual, as an attorney, expects to be disseminated. ("...shall not make or participate in making an extra-judicial statement he expects to be disseminated...") The code in other jurisdictions, however, proscribes only those statements that a reasonable person expects to be disseminated.

The New Jersey rule does require that an attorney exercise his special skills and knowledge before making public comments. He is held to a stricter standard because he is equipped with the abilities to ascertain what that standard demands. Committee on Professional Ethics v. Durham, supra., at 283. Thus, the vagueness challenge to DR 7-107(D) fails for precisely the same reason that it failed against DR 1-102(A)(5). From the standard of a reasonable attorney, with all of the resources he has available, it is possible to determine what conduct is prohibited. It is, perhaps, a standard that the reasonable person might find difficult to satisfy, but the burden it places on attorneys is not unreasonable given the other policy considerations that the rule is designed to promote.

CONCLUSION

Appellant's multifaceted attack on the constitutionality of DR 1-102(A)(5) and DR 7-107(D) fails on every count. The broad constitutional principle which he asserts governs the criticism of judges is far less expansive than he claims. Specifically, it is constitutional for courts to maintain the integrity of the judicial process even when this may mean some minimal limitation on otherwise protected rights. The intemperate and vituperative criticism of judges clearly falls within the area that courts can regulate.

Appellant's second argument, that DR 7-107(D) utilizes the wrong test in measuring when speech can be regulated, also fails. While the issue is somewhat closer here, the weight of authority holds that the standard should be whether the comments pose a reasonable likelihood of interference with a fair trial. This is the standard adopted by DR 7-107(D).

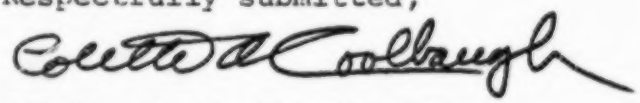
The application of this standard to Appellant's comments has also been demonstrated, thus nullifying his claim that DR 7-107(D) is unconstitutional-as-applied. The context in which the speech was made makes it clear the comments were designed to affect the trial. The very purpose of the rule is to prevent such prejudicial effects. Moreover, there is prima facie evidence that Appellant was associated with the defense team. Whatever questions remain unanswered about that association are due exclusively to Appellant's own lack of cooperation with the disciplinary investigation. Appellant was never denied an opportunity to show that his conduct did not pose the reasonable likelihood of intereference with which he was charged.

DR 1-102(A)(5) can also be constitutionally applied to Appellant since the mere fact that he violates one disciplinary rule does not

preclude violations of other rules for the same conduct. Additionally, the facial constitutionality of this rule has withstood many challenges. All have failed because the alleged vagueness and overbreadth of DR 1-102(A)(5) can be cured by applying the "reasonable attorney" standard which holds lawyers to a higher degree of legal knowledge than ordinary citizens.

These same considerations apply to the facial constitutionality of DR 7-107(D). While some phrases of that rule are arguably vague, the standard of the "reasonable attorney" should again be used to cure notice problems. In New Jersey, the rule is even stricter since it is phrased in terms of what the particular attorney expects to be disseminated by public communications. In the past, this Court has expressed great reluctance to declare a rule or regulation unconstitutional when they can be easily saved by proper interpretation. Certainly, there is ample authority for upholding the constitutionality of DR 1-102 (A)(5) and DR 7-107(D) against any of Appellant's challenges. The Court should so rule.

Respectfully submitted,



Colette A. Coolbaugh, Esq.
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Trenton, New Jersey 08625

Lennox Hinds, Esq.—for Plaintiffs—Direct

October 2, 1979
Trenton, New Jersey

BEFORE:

CLARKSON F. FISHER
United States District Court Judge

Appearances:

MORTON STAVIS, Esquire
and
BERNARD K. FREAMON, Esquire
Co-Counsel for Plaintiffs.

JOHN J. DEGNAN, Attorney General
By: STACEY L. MOORE, JR., Assistant Attorney General,
For Defendant Middlesex County Ethics Committee.
SPAGNOLI & THURING, Esquires,
By: RICHARD M. THURING, Esquire
For Defendant Edward J. Barone.

Testimony of Lennox Hinds, called as a witness for the Plaintiffs.

(3) LENNOX HINDS, having first been duly sworn, testifies as follows:

Direct examination by Mr. Stavis:

Q. Mr. Hinds, are you a member of the Bar of the State of New Jersey? A. Yes.

Q. Where did you obtain your education? A. Trinidad, West Indies, the elementary, and the secondary schools and then I went to undergraduate school at City College

of New York and did graduate work at the University of Minnesota and at Rutgers University and after that I went to law school at Rutgers University.

Q. And when did you graduate from law school? A. 1972.

Q. Did you have an occupation before you (4) became a lawyer? A. Yes, I was a research scientist.

Q. What field of science? A. Petrochemical research and also biochemical research prior to that.

Q. And following your graduation from Rutgers Law School were you admitted to the Bar? A. Yes.

Q. In what year? A. 1973.

Q. And what work did you do following your admission to the Bar? A. I worked first as director of a prison project for the American Civil Liberties Union and then I assumed a position of Associate Director of the National Conference of Black Lawyers. I did that for about one year, and then I worked for five years as National Director of the National Conference of Black Lawyers.

Q. And when did you terminate that directorship? A. I terminated that directorship August 30, 1978.

Q. Could you describe the National Conference of Black Lawyers? A. It is an organization, Bar Association, if (5) you may, comprising of about 1,000 or so black lawyers throughout the United States, Canada and the Virgin Islands and it is affiliated with or has an affiliation with the Black American Law Students Association, comprising of some four to five thousand black law students across the United States. The organization has one of its primary purposes and missions is to seek out and eradicate racism throughout the United States in all of its forms and also to encourage law students, black law students, to practice law, to defend the poor and depressed minorities within the United States and to speak out on behalf of

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those who have been victims of racial discrimination in the United States. Those are the general purposes of the organization.

Q. What are the duties of the Director of that organization?

Mr. Moore: I have to object at this point. Granted, this is an evidentiary hearing on the basis of plaintiff's representation that they had evidence of bad faith on the part of the Ethics Committee to bring these charges. All this information is very interesting but has nothing whatsoever to do with the issue of bad faith, so I would object on the basis (6) of relevancy.

The Court: Well, Mr. Hinds is facing some sort of action by the Bar Association and simply to have him sit here and testify directly about that leaves sort of a vacuum in my trying to decide this case. I am going to give you leeway there.

Mr. Stavis: Thank you very much.

Would you read the question, please.

(Whereupon the pending question is read back by the reporter.)

A. Among the duties of the Director of the organization is to be the chief spokesperson for the organization in addressing the issues that organization has been organized around and I testified to previously, to attend or to call press conferences across the United States with respect to various judicial proceedings, to monitor those proceedings and to speak out at press conferences and at other public assemblies with respect to those issues, to present testimony before State and Federal legislative bodies with

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respect to either pending legisation or present legislation as they impact on, again, minorities and instances to represent or to act as counsel in the representation of particular individuals in their (7) attempts to obtain relief in the Federal and State courts on racial charges.

Q. Did you have any association with the Assata Shakur case? A. Yes, I did.

Q. What was your contact with that case? A. I represented Miss Shakur in several matters that were brought before the Federal courts. It involved conditions of her confinement after she was arrested and while she was a pretrial detainee. There were matters that were before this particular court, before Judge Fisher, there were matters that were litigated before Judge Barlow who is deceased now, there were matters that were taken up on appeal to the Third Circuit but I was intricately involved in the Federal litigation, in Federal courts concerning conditions of confinement and treatment while in prison as a pretrial detainee. That was my involvement.

Q. Did you represent her in the criminal proceedings brought against her by the State of New Jersey? A. No.

Q. In any way, did you represent her in those proceedings? A. No, not at all. I never entered any appearance (8) and didn't represent her at all.

Q. Now, certain charges are made against you in connection with a press conference which was conducted on January 20, 1977. Did you conduct such a press conference? A. Yes, I conducted and participated in a press conference which occurred at my office on Bayard Street in New Brunswick, New Jersey.

Q. And can you tell us in what capacity you had that press conference? A. I called a press conference in my capacity as Director of the National Conference of Black Lawyers and I addressed members of the press there with respect to some issues involving the Shakur case.

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Q. Now, you have seen certain language that was attributed to you that you employed at the press conference and some of which is referred to is the charges which were made against you. Is the language which has been attributed accurate and correct as far as you know? A. Well, as I recall the language, counsel, let me just rephrase the aspect of the language that I agreed that I in fact made. I said that the Judge, in my opinion, should recuse himself for the following (9) reasons: Because he lacked the judicial temperament, the way he was conducting the trial and racial sensitivity to be impartial. I made those statements and I believe that the record and the transcripts of the trial speak for themselves. I also said that the way he was conducting the voir dire or that aspect of the proceedings would result in kind of recall and by that meaning of the term it is Webster's definition of it by which I was referring. I was quoted as saying I was speaking for the defense. I disagree with that particular statement to the extent those are the allegations that are made. What I did say was that I was speaking for the defendant who was on trial just as I spoke on her behalf a few weeks ago in Geneva before the United National Subcommission on the Prevention of Discrimination and I have spoken on behalf of other defendants in my capacity as Director of the Conference of Black Lawyers. I never said I was speaking for the defense.

Q. Were you, in fact, speaking for the defense or defense lawyers? A. The defense lawyers were there or some defense lawyers were there and they made some comments but I, in fact, had called the press conference in my capacity as Director of the National Conference of Black (10) Lawyers. I was not speaking, nor was I authorized to speak for the defense. By defense, I assume, and I again am not sure, by defense I assume

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is meant in the charges, the defense lawyers but I am not really sure what is meant there by that, by the allegations. I just wanted to make a correction with respect to what my intentions were, speaking for the defendant.

Q. Excuse me just a moment, please.

Mr. Hinds, for the benefit of the Court, could you give us the names of some of the other defendants on behalf of whom you have spoken, either in the United States or in international countries? A. I have spoken on behalf of Joann Little, who was charged with murder, the killing of a prison guard in North Carolina and was on trial around 1975; I have spoken on behalf of the Reverend Ben Shavers in Wilmington, Tennessee, who is imprisoned right now in Raleigh, North Carolina; I have spoken on behalf of Mario Beslalli (phonetic), Republic of New Africa, who is imprisoned right now in Fort Leavenworth, Kansas; I have spoken on behalf of Angela Davis when she was in prison; I have spoken on behalf of Russell Means of the American Indian Movement, who is imprisoned in South Dakota as a result of a Wounded Knee situation; (11) I have spoken on behalf of Puerto Rican nationalists who were just released after spending 25 to 27 years in federal prison. Would you like me to go on?

Q. Did you ever get around to speaking about George Merritt? A. I have spoken about George Merritt and Dell Maddon, who are imprisoned serving life sentences in New Jersey, resulting from the death of a policeman following the rebellions and riots in Plainfield around 1967.

Q. Now, Mr. Hinds, when you refer to the fact that you have spoken on behalf of these people, is this consistent with any policies defined by the Board of Na-

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tional Conference of Black Lawyers or did you act individually? A. No, this is a mandate, a mandate that has been promulgated by the Board of Directors of the organization and which requires that as part of my duties and responsibilities as a National Director, to speak out in a candid and open way with respect to certain cases that exemplifies some aspects of discrimination or racial intolerance in the judicial process. It might be an issue involving bail, it might be an issue involving arrests, it might be an issue involving parole, it might be an issue involving the conduct of (12) the trial, it might be the totality of those but I was mandated, as my predecessor was mandated, as my successor has been mandated to speak out on those issues and, in fact, one of the conditions accepting the position is being prepared to speak out vociferously on those questions.

Q. And was it pursuant to that mandate that you held the press conference on January 30 of 1977? A. That is correct.

Q. And made the statements that were attributed to you? A. That's correct, and after making that statement, I reported to the Board with respect to all of the actions that have been taken by the Bar Association and so on.

Mr. Stavis: Thank you very much. Your witness.

The Court: May I just ask a question before you start?

Mr. Hinds, I don't have to, as you know, decide whether or not those remarks were proper or improper. I just want to get from you, if I can, as to whether or not your previous representation of Miss Shakur was simultaneous (13) or what-

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ever, that you felt or did you take into account that that representation might be, how should I put it, might roll over into your role, as you have just indicated to us, mandated you to say whatever you thought was proper? Did you think confusion would come out of it? Did you ever consider that?

The Witness: In the prior representation, an issue would come out of that?

The Court: No, that when you made these statements, did you take into consideration your prior representation, whether the public or a court or anybody else or an ethics committee might think that you were speaking out as her lawyer and that way bringing yourself into, perhaps, the case itself?

The Witness: No, Judge, I did not consider that. In fact, I viewed my role, one, as her advocate, if you may, in federal courts. I saw and made comments from time to time with respect to that case and other cases that I have been involved in. I really didn't see that as an issue. When I spoke in New Brunswick at the press conference, I pointed out very specifically I was not dealing with the matter (14) that was in Federal Court, I was dealing with a condition that existed in the State proceedings and I daresay that the lawyers who represented her in the State proceedings subsequently went into Federal Court to seek some removal, some relief by way of removal, but I was not—I did not view myself as being involved in that.

The Court: It never entered your mind that you were speaking on her behalf, as her lawyer at that time.

The Witness: No, no.
The Court: Okay. Mr. Moore.

Cross-examination by Mr. Moore:

Q. Now, review P-2 in evidence, please.

(Witness complies.)

In reference to P-2 in evidence, do you recall making this statement on January 20 that the trial before Judge Appleby was a travesty, "travesty"? A. Yes.

Q. You also recall saying that Judge Appleby, "Did not have the judicial temperament and racial sensitivity to sit as an impartial judge." (15) A. Yes.

Q. Did you also refer to the trial as a "legalized lynching"? A. I don't recall that precisely.

Q. You don't recall that? A. No, I don't recall that.

Q. Do you recall saying that the way Judge Appleby was questioning the jurors was, "leading to the creation of a hangman's court"? A. I don't recall that. I recall saying a kangeroo court but I don't recall a hangman's court.

Q. Do you recall referring to it as a kangeroo court but not as a hangman's court? A. Yes, I do recall that.

Q. Do you recall saying that because Judge Appleby had, "gagged," the defense team, that you had to act as spokesman for the defense team? A. No, I don't recall saying that.

The Court: That is consistent with what you were just saying a little while ago.
The Witness: Well, I said that I did—

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The Court: The defense team was one thing and you were another. I infer that from the quote.

The Witness: Yes, but I do not—I (16) think that was the editors putting that together in that fashion. The reporters might have asked me whether or not I was aware that the defense team were gagged and I might have said, yes, but I don't recall saying that, because—

Q. You don't recall saying you were a spokesman for the defense team? A. No. I did say I was speaking for the defendant.

Q. You do admit that that is what the newspaper article says. A. That is what it says, yes.

Q. Have you subpoenaed Mr. Hayes or Miss McIntyre to testify or to retract these statements that they attributed to you in the newspaper article? A. I don't know what my lawyers have done.

Q. You mentioned other actions in Federal courts that you filed on behalf of Joanne Chesimard. What actions were you referring to? A. I think that there was a matter which was brought before Judge Barlow sometime around 1976 or thereabouts in which we asked for injunctive and declaratory relief to enjoin the authorities, sheriff and freeholders, I think, from keeping Miss Shakur in the basement of the all-mens jail and to remove her to a facility where all women, pretrial detainees were (17) being held. That matter was heard by Judge Barlow and following that he ruled that she required to be given Fourteenth Amendment due process rights pursuant to and ordered that an administrative hearing be held. Do you want me to go through this?

Q. Yes, I am interested in the other actions. A. An administrative hearing was held at which point the Ad-

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ministrative Officer ruled that the prison authorities were, in fact, holding her illegally and ordered she be sent over to the womens' detention. The prison authorities decided that they were going to follow the recommendation or the Order of the hearing officer that they hired. We then came back before Judge Barlow for an equivalent of a Writ of Mandamus but—it isn't a Writ of Mandamus, it is a Direct Order and Judge Barlow gave the prison administrators, I think, 30 days in order to take whatever corrective action. We then went back to the State Court, and the State Court ruled, Judge Demos ruled that the prison authorities could appeal the decision of the hearing officer. That was appealed and the Superior Court in the State of New Jersey ruled that the hearing officer was arbitrary in his decision and at that point in time, the trial began (18) and I did not pursue the matter any further. In fact, the matter was subsequently dismissed. But this took, incidentally, over a year back and forth in the courts.

Q. Did you file the motion in Federal Court to stay the jury selection process? A. To stay the jury—no.

Q. Who filed that, if you know, on behalf of the defendant? A. To stay the jury? I don't know.

Q. And have the matter removed to Federal Court. A. I think that that was filed by her lawyers, Mr. Kuntzler and the others, but I really don't know anything about it. I do know that I was consulted about the status of the Federal litigation and her lawyers asked me for copies of my pleadings which were in the Federal Court and I assume that they had incorporated it, as part of their reasons for their removal of the conditions proceedings which included the litigation so my pleadings may have been part of that but I gave it to them but, in fact, I have not even reviewed—if you ask what did the final document look like, I haven't seen it.

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Lennox Hinds, Esq.—for Plaintiffs—Cross

Q. So you think your pleadings may have (19) been used in the Federal action to stay jury selection and have the case removed? A. I assume part of it might have been. I was asked for the status of the matter and then asked whether or not I had extra copies of the pleadings.

> The Court: Was that a courtesy or were you retained to do that?
>
> The Witness: No, I was not retained. I did it as a matter of course with lawyers who consult with me from around the country on matters, ask me for copies of pleadings and so on and I sent them.

Q. So you assisted the defense team in that respect. A. Assisted them as I assist any lawyer who asks, as a matter of courtesy, for assistance.

Q. Did you ever have a meeting with the defense team or discuss the Federal civil litigation that you were handling? A. No, no, no.

Q. When did you open your office in New Brunswick? A. That office was opened prior to my being a lawyer. In fact, I used to be the Director of the Heritage Foundation and the office was there then when (20) I was admitted to the Bar in '73, January of '73, so you can say I opened an office there at the same site.

Q. From 1973? A. Yes, January of '73.

Q. What is the National Jury Project or what was the National Jury Project? A. What is the National Jury Project? To the best of my information, and I am not speaking with any degree of authority or competence on this subject, but I think the National Jury Project is a private unincorporated association, that is my thinking, and that they are made up of social scientists and lawyers but, again, I am not sure whether there are any lawyers.

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I do definitely know there are social scientists, psychiatrists, sociologists, behavioral scientists who make correlations and studies with respect to these attitudinal surveys which are used with respect to research on juries.

Q. Do you know whether the National Jury Project investigated the background of potential jurors in the Joanne Chesimard case? A. Let me say the National Jury Project used my office at 94 Bayard Street as courtesy in addition to the defense lawyers who came from all over. Some (21) came from New York, some came from Mississippi. They used my office.

Q. The National Jury Project was asked to investigate the background of potential jurors in the Joanne Chesimard case, is that correct? A. I don't know about that. You'd have to ask the defense lawyers about that.

Q. In any event, you provided them office space. A. They asked me for office space. The defense lawyers asked me whether or not they could use my office during the length of the trial, the duration of the trial, and I agreed.

Q. What lawyers used your office on the defense team? A. Who actually there were I don't know because, quite frankly, I operated out of New York and only with respect to my matters in New Jersey. I tended to use that office but most of the time I was traveling around the country or in New York.

Q. But didn't— A. Let me finish. I do not know who, specifically, used the office, how often they were there, etc. I gave my approval for that office to be used by the National Jury Project or by the people associated (22) with that project and with them.

Q. So you assisted the defense team in providing office space, for not only defense lawyers, but also this National Jury Project? A. Let me say again, as a courtesy, they asked me whether or not they could use my office.

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It is very similar, for example, to the fact that as a courtesy, the law offices of Mandel, Wysoker & Weingartner agreed for us or for me to use their offices while I was taking depositions of all of the witnesses in this particular case; only because I do not have an office in New Brunswick and that is a common courtesy that is utilized between members of the Bar, as I understand it.

Q. Do you remember an incident during the pretrial motions of the Joanne Chesimard trial and an incident where you attempted to sit at counsel table? A. No. As I recall what occurred, it was the first day of the trial, the first day of the trial in which there was a lot of confusion with respect to where various people were seated and so on and I was asked to come forward and as I was moving forward, one of the court attendants asked me whether or not I was counsel of record and I said no, and he said, (23) you cannot come forward. In fact, I was unable even to speak to Miss Chesimard. I wanted to talk to her about some matters because, as I said to you, the trial was contemporaneous with the ending of part of the Federal litigation and I could not even speak to her there unless I was counsel of record. They told me that I had to speak to her back in her prison cell.

Mr. Moore: As your Honor might certainly understand, I was not prepared here to try the merits of whether he was associated with the defense team or not.

The Court: Yes, and it is not part of my decision, really.

Mr. Moore: I have no other questions.

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The Court: Did you know any of the members of the Ethics Committee? They changed it around since but did you know who testified here, who instigated this action here? Did you know any of them?

The Witness: Let me see. Who do I know? No, I did not know any of these people, Judge, but it is fair to say that given the nature of my position with the Conference of Black Lawyers and the sensitivity of many issues (24) that I have spoken about, that they may have known me.

The Court: You did not know any of the members personally?

The Witness: No, no.

Testimony of Victor Goode, called as a witness for the Plaintiffs.

VICTOR GOODE, having first been duly sworn, testifies as follows:

Direct examination by Mr. Freamon:

Q. Mr. Goode, what is your present occupation? A. I am the National Director of the National Conference of Black Lawyers.

Q. Are you an attorney at law? A. Yes, I am. I am an attorney here in the State of New Jersey.

Q. And for how long have you been admitted? A. Since 1974.

Q. And how long have you been associated with the National Conference of Black Lawyers? A. I joined the National office staff as the Associate Director in 1975

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MIDDLESEX COUNTY, SUPERIOR AND COUNTY COURT CRIMINAL RECORD Date: 5/11/73

Name of Case: State of New Jersey

vs.

Joanne D. Chesimard

Offense(s):

TRIAL

ATTORNEYS

For State: Edward J. Barone
Kenneth F. Hense

For Defendant(s): Lewis Myers, Jr.
William M. Kunstler
Lawrence Stern
Stuart Ball

Judge: Theodore Appleby

Reporter: Stanley Grabon

Clerk: Lawrence J. Mason

(If a different judge, reporter or clerk presides at any proceeding; indicate names below against the date or dates thereof)

DATE	PROCEEDINGS
1/10/77	The defendant again refuses to rise as Court is convened. Court Officers:Bob Hospidor, Roy Gregersen and Bruce Hawkins
1/17/77	Judge:Theodore Appleby Reporter:Jeanette Voight Clerk:Lawrence J. Mason Prosecutor:Edward Barone and Kenneth Hense Atty.:Lawrence Stern, William M. Kunstler, Evelyn Williams, Lewis Myers Lennox Hinds and Stuart Ball Jury interrogation begins in this matter today. The defendant refuses to rise as court is called to order. Court Officers:Bob Hospidor, Roy Gregersen and Bruce Hawkins
1/18/77	Judge:Theodore Appleby Reporter:Jeanette Voight Clerk:Lawrence J. Mason Prosecutor:Edward Barone Atty.:William M. Kunstler, Kenneth Hense Evelyn Williams, Lawrence Stern, Lewis Myers and Stuart Ball Jury selection continues. The defendant refuses to rise as Court is convened. Court Officers:Bob Hospidor, Roy Gregersen and Bruce Hawkins
1/19/77	Judge:Theodore Appleby Reporter:Jeanette Voight Clerk:Lawrence J. Mason Prosecutor:Edward Barone & Kenneth Hense Atty.:William M. Kunstler, Evelyn Williams, Lawrence Stern, Lewis Myers and Stuart Ball Jury Selection continues. Court Officers:Bob Hospidor, Roy Gregersen, and Bruce Hawkins
1/20/77	Judge:Theodore Applbey Reporter:Jeanette Voight Clerk:Lawrence J. Mason Prosecutor:Edward Barone & Kenneth Hense Atty.:William M. Kunstler, Evelyn Williams, Lawrence Stern, Lewis Myers, Stuart Ball Jury selection continues. The defendant refuses to rise as Court is convened. Court Officers:Bob Hospidor, Roy Gregersen, Bruce Hawkins

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I.1437-72

ESSEX COUNTY, SUPERIOR AND COUNTY COURT CRIMINAL RECORD Date: 5/11/73

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1/17/77	Judge: Theodore Appleby Reporter: Jeanette Voight Clerk: Lawrence J. Mason Prosecutor: Edward Barone and Kenneth Hense Atty.: Lawrence Stern, William M. Kunstler, Evelyn Williams, Lewis Myers Lennox Hinds and Stuart Ball Jury interrogation begins in this matter today. The defendant refuses to rise as court is called to order. Court Officers: Bob Hospidor, Roy Gregersen and Bruce Hawkins
1/18/77	Judge: Theodore Appleby Reporter: Jeanette Voight Clerk: Lawrence J. Mason Prosecutor: Edward Barone Atty.: William M. Kunstler, Kenneth Hense Evelyn Williams, Lawrence Stern, Lewis Myers and Stuart Ball Jury selection continues. The defendant refuses to rise as Court is convened. Court Officers: Bob Hospidor, Roy Gregersen and Bruce Hawkins
1/19/77	Judge: Theodore Appleby Reporter: Jeanette Voight Clerk: Lawrence J. Mason Prosecutor: Edward Barone & Kenneth Hense Atty.: William M. Kunstler, Evelyn Williams, Lawrence Stern, Lewis Myers and Stuart Ball Jury Selection continues. Court Officers: Bob Hospidor, Roy Gregersen, and Bruce Hawkins
1/20/77	Judge: Theodore Applbey Reporter: Jeanette Voight Clerk: Lawrence J. Mason Prosecutor: Edward Barone & Kenneth Hense Atty.: William M. Kunstler, Evelyn Williams, Lawrence Stern, Lewis Myers, Stuart Ball Jury selection continues. The defendant refuses to rise as Court is convened. Court Officers: Bob Hospidor, Roy Gregersen, Bruce Hawkins

Dal

Number

RECORD

Date:

PROCEEDINGS

Exhibits for Plaintiff:

D-10 to D-23 Newspaper items.

Defendants motion (Brown) for a continuance DENIED. D.10 to D.23 Newspapers. (Identification)

Defendants application (Williams) that Court reconsider more extensive Voir dire - Court will be more specific in questions & newspapers of the last few days.

Court Officers: Same

1-9-74 No Court - Snow Storm

Court Officers: Salvatore Cortile, Thomas Healy, [illegible] Mildred Scott, Eleanor [illegible], John [illegible]

1-10-74 Jury Sworn:
1. William L. Countag 40A 1/10/74
2. Kathryn D. Dayso 12A 1/10/74
3. George F. Wittman, Jr. 9A 1/7/74
4. Winston Robinson 70A 1/7/74
5. Catherine M. Howe 43A 1/10/74
6. Pasquale T. Guarini 37A 1/10/74
7. Robert C. Harrington 39A 1/10/74

Exhibits for Defendant:
D-24 Daily newspaper 1-10-74 evidence as to motion for continuance.

Court Officers: Same as above.

1-11-74 Jury Sworn:
Same as above 7 in addition:
8. Joseph B. Baker 4A 1/11/74

Exhibits for Plaintiff:

D.12 Daily Newspaper 1/11/74 [illegible] evidence as to motion only.

Defendants motion (Brown) that [illegible] Defendant (Parcon as of today's paper) [illegible] 3, 10, 14, 16 the balance of the special panel and will [illegible] Jurors from general panel.

Defendants motion (Williams) [illegible] the demonstration in [illegible] House at lunch time of [illegible] people in full Nazi uniform [illegible] supporting White Fellow, [illegible] etc., and that Court [illegible] entire panel and not weeks panel. (Defts. [illegible] Kenney Jails in Boston.) Motion DENIED.

1-14-74 Jury Sworn:
Came 1 thru 8
9. Dorothy F. Robsham 2. 145 1/14/74
Attorneys: Lennox Hinds, Raymond Brown, Evelyn Williams & S. Williams,

(Pa-22)

Best Copy Available

Date [illegible]

STATE OF NEW JERSEY

Judge JOHN E. BACHMAN

SUPERIOR Court

Pltff.

vs.

Case No. 1437-72
1436-72

Reporter [illegible]

JOANNE DEBORAH CHESIMARD and
CLARK EDWARD SQUIRE a/k/a
JAMES HENRY WALKER a/k/a
ARCHIE GIBSON

Clerk Marjorie Walsh

Dft.

JURY SWORN

1 [illegible] William A. Smith 9. Dorothy J. Nelson
2 Kathryn A. Burger 10.
3 Beryl F. Hallowell, Jr. 11.
4 Harold Gibson 12.
5. Arthur L. Hart 13.
6 Reginald T. Brown 14.
7. Robert L. Hannigan 15.
8 Joseph R. Baker 16.

State
Attorney for [illegible]

Asst Prosecutor, C. Judson Hamlin
Nicholas Stroumsos

Witnesses sworn for [illegible] State

Attorney for Defendant
[illegible]
Raymond Brown, Esq.
Evelyn Williams, Esq.
Charles T. McKinney, Esq.

Exhibits for Plaintiff

Best Copy Available

Witnesses sworn for Defendant

Exhibits for Defendant

Jury Out
In:
Verdict:
Recess

Court Officers: [illegible]

LOCAL

SPEAKING OUT—Poet and playwright Imamu Amiri Baraka was one of the speakers at a benefit for JoAnne Chesimard last night at the Rutgers University Student Center.

CLAIMS HARRASSMENT BY BAR ASSOCIATION

Chesimard supporter attacks critics

By LORRAINE STONE
Home News staff writer

NEW BRUNSWICK — Lennox Hinds, president of the National Conference of Black Lawyers (NCBL), says he is being "harrassed and intimidated" for speaking out against trial proceedings and in support of JoAnne Chesimard.

Hinds, a Franklin resident, last night read a letter sent him by the Ethics Committee of the Middlesex County Bar Association, citing statements he made to the press in January.

According to the letter, which was signed by David M. Foley, a committee member, Hinds "violated disciplinary rules" of the state bar association.

Speaking last night at a fundraising program for Mrs. Chesimard at the Rutgers University Student Center, Hinds said his comments were carried in stories in the Newark Star-Ledger and the New York Daily News.

Those accounts, Hinds read from the letter, quoted him as describing the "Lawyers have a duty," he said, "a duty to curb lawlessness in the courts."

Hinds said he would appear before the ethics committee with a team of lawyers from NCBL, the American Civil Liberties Union, the Center for Constitutional Rights, the National Lawyers Guild and the Garden State Bar Association.

In addition, he said he would call upon the bar association to monitor Mrs. Chesimard's trial daily and to investigate the conduct of the prosecutor's office.

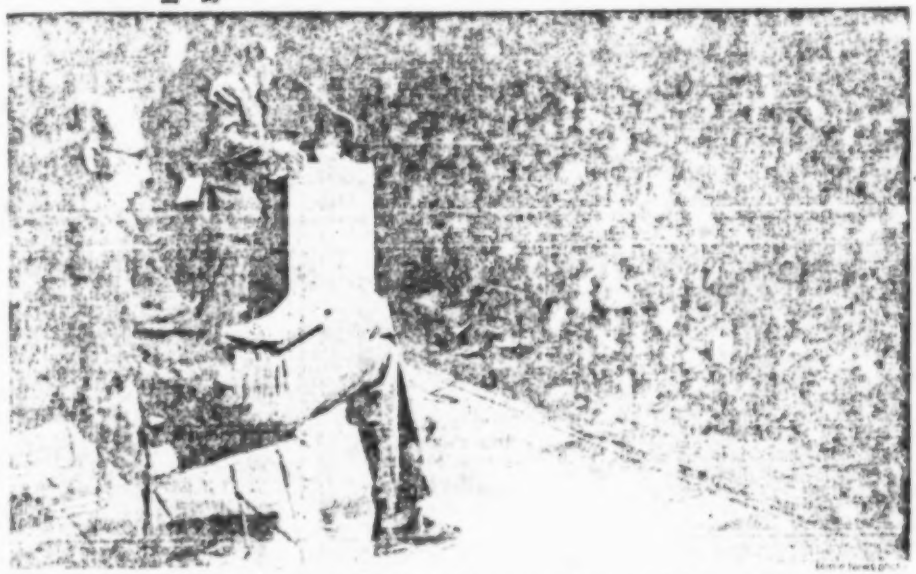
Defense attorneys Lewis Myers and William Kunstler also appeared on the program, each urging the audience to see that the situation described by their colleague was not a separate or isolated incident.

"The threat to take away the license to practice law of a man for speaking out ... you must see how inextricably it is entwined with the fate of Assata Shakur (Joanne Chesimard)," Kunstler said.

The chief defense attorney spoke about his own troubles after speaking out during an appearance at Rutgers last October. He was charged with violating court rules governing New Jersey lawyers and with contempt of court. Charges were dropped Dec. 14.

Myers read the opening day statement by the defendant, which Appleby barred her from reading in court. The attorney also pointed to last week's removal of a Chesimard supporter from the courtroom as another incident of harrassment.

Poet and playwright Imamu Amiri Baraka also participated in the benefit.



IN THE WINGS—Phil Shinnick, the controversial athletic instructor at Livingston College was among those on the dias last night as supporters of JoAnne Chesimard held a benefit at the Rutgers University Student Center. Speaking in the background is William Kunstler, one of Mrs. Chesimard's lawyers.

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Appendix

2

SUPREME COURT OF NEW JERSEY

Docket No. D-61

In the Matter of :
:
LENNOX S. HINDS, :
:
An Attorney at Law :

REPLY BRIEF ON BEHALF OF APPELLANT

MORTON STAVIS
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On the Brief:

MORTON STAVIS
BERNARD K. FREAMON
NEIL MULLIN

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1978 6

Preliminary Statement

Respondent's brief, as submitted to this Court, presents a number of problems with respect to the standards of advocacy which should be noted.

A.

Appellant Hinds in his brief in chief cited a series of decisions of the Supreme Court of the United States establishing that the clear and present danger test limited the power of the government to regulate speech even if it were deemed that the speech could in some way affect the administration of justice and even if the speech were uttered by lawyers. Specifically those cases hold, so appellant contended, that criticism of the fairness of judges by lawyers is not punishable unless the clear and present danger standard is violated.

Almost at the opening of its argument, respondent says:

> "In fact, however, the Supreme Court rejected this [appellant's] very claim over a century ago. In Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872), the Court upheld the disbarment of Bradley, an attorney who had defended one of the conspirators in the assassination plot against Abraham Lincoln, because he had made threatening and insulting remarks to the trial judge. While recognizing the severity of disbarment, the Court nevertheless felt that Bradley's comments warranted such a penalty." (Rb10)

Thereupon, respondent quotes a paragraph from Bradley v. Fisher[1/] which takes no account of whether the administration of justice had been obstructed, or even threatened with obstruction, and thus seems to approach the "blaze of glory" thesis

1/ "[T]he obligation which attorneys impliedly assume, if they do not by express declaration take upon

[Footnote continued on next page.]

so thoroughly rejected in the impeachment trial of Judge Peck and other cases cited in appellant's brief.

Respondent's explication of Bradley v. Fisher is simply untrue. That case in no way upheld the disbarment of the attorney. In fact, in a case decided by the Supreme Court of the United States three years earlier (not cited by respondent, Ex parte Bradley, 74 U.S. (7 Wall.) 364 (1869), the disbarment of Bradley was reversed because the lower court had acted outside of its jurisdiction.

Far from being a case where "the Court upheld the disbarment of Bradley," the cited case dealt with a damage suit by Bradley against Judge Fisher, the judge who had disbarred him. The Court held the suit was not maintainable on grounds of judicial privilege.

Thus, not only is the description of Bradley v. Fisher not true; beyond that the quotation so heavily relied upon by respondent is obiter dictum.

[Footnote continued from previous page:]

> themselves when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial office. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts."

80 U.S. at 355.

The quotation goes far beyond the facts in Bradley. There seems to have been a threat of violence in that case (id. at 356) which of course takes the case completely out of the scope of speech and criticism.

Additionally, it should be noted that while Bradley v. Fisher is a well known case, it has almost always been cited for its holding with respect to judicial immunity. Shepard's Citations shows it to have been referred to more than 230 times, including five times in New Jersey,[2/] but only an occasional citation suggests that it is viewed as fixing a standard of conduct for lawyers, and then only as to false charges of corruption against a judge. Cf., In re Knight, 264 App. Div. 106, 34 N.Y.S. 2d 810 (1942).[3/]

A careful survey reveals no reported case in which Bradley v. Fisher has been cited as authority for the idea that lawyers may not criticize judges and attack their fairness, or that lawyers may be treated differently from other citizens in respect to the exercise of constitutional rights.

B.

Respondent's brief seems wholly unrestrained by the record. This becomes evident from the "counterstatement of

2/ Cashen v. Spann, 66 N.J. 541, 547 (1975); In re Quinlan, 70 N.J. 10, 48 (1976); Cashen v. Spann, 125 N.J. Super. 386, 395 (App. Div. 1973); DeGroot v. Muccio, 115 N.J. Super. 15, 22 (Law Div. 1971); Centennial Land & Development Co. v. Town of Medford, 165 N.J. Super. 220, 225 (Law Div. 1979).

3/ The recent decision of the New York Court of Appeals in In the Matter of the Justices of the Appellate Division, First Dept. v. Erdmann, 33 N.Y. 2d 559, 347 N.Y.S. 2d 441 (1973), may have limited the Appellate Division's reliance on Bradley even in this limited area. In Erdmann, the court reversed an Appellate Division decision which sustained disciplinary action against a lawyer who criticized trial judges sharply and then wrote that Appellate Division judges "aren't any better. They're the whores who became madams," (dissenting opinion). The New York Court of Appeals said: "Without more, isolated instances of disrespect for the law expressed by vulgar and insulting words or other incivility, uttered or written, or committed outside the precincts of a court are not subject to professional discipline."

Mr. Erdmann is now a New York state court judge.

facts" (Rb4 to 8), which contains not a single reference to the record.[4/]

Respondent accordingly feels free to make factual statements to the Court for which there is no support in the record and which are in some respects wholly unrelated to appellant Hinds's conduct. Thus, in the first full paragraph of page 6, the Court is told that Hinds read David Foley's letter at a fund-raising rally and that William M. Kunstler, Esq. made certain comments and a copy of a newspaper article describing those comments is appended. None of this is in the record and we are at a loss to understand the relevance of Mr. Kunstler's comments.

In the last paragraph (uncompleted) of page 6, the Court is told that Hinds obtained a "sixty day stay of the investigation ... with the understanding that at its expiration Appellant would fully cooperate with the investigation." There is nothing in the record supporting such a statement and there was no such understanding. In fact, William Moran had made clear that such cooperation was not required and his letter to that effect is in the record (254a). It was after that that Hinds declined to cooperate with Foley.

Perhaps the most egregious departure from normal standards of advocacy requiring counsel to adhere to the record appears at page 26, at the end of the uncompleted paragraph, and in particular in the attachment to the brief of what appears to be

4/ There is a record here. Appellant deposited with the Court a copy of the transcript before the United States District Court and the exhibits there presented. No other factual material was lodged with the Court by respondent.

minute sheets from the records of the court, from which respondent argues that possibly Hinds was in fact counsel for Joanne Chesimard in her criminal trial. These documents, never heretofore presented to the Court or disclosed to appellant, are inappropriate at this stage. In any event, they are firmly disputed by Foley's own report to the Board (247a-251a), the understanding of Robert E. Cowen, then secretary of the Central Ethics Committee (253a), Judge Appleby's testimony (279a), and Hinds's testimony (217a). That a court clerk may have made an error of notation because of Hinds's representation of Chesimard in a wholly separate proceeding is hardly a basis for impeaching the clear state of the record.

This Court, by its order dated June 3, 1981, asked the parties to comment upon the question whether further evidential hearings were necessary. When respondent answered the Court's request, it did not advise the Court or appellant that it wished to include in the record the items it has attached to its brief. Had it done so, appellant would have responded by appropriate affidavit showing the court minutes to be erroneous.

After the Court made its order directing the parties to file briefs, the respondent did not employ the procedure provided for in the rules of the Court - a motion to supplement the record, R. 2:5-5 - which would have given appellant the opportunity to respond and the Court the opportunity to weigh the question whether the record should be supplemented. Instead, respondent simply unilaterally created its own record.

While this case by no means turns upon whether the Court considers these items, we observe that an authority in the field of appellate advocacy before the Supreme Court of the United States had the following to say of this practice:

> "Quite apart from bringing new developments to the attention of the Court, some counsel have sought to influence the Court's decision in a case by attaching to a brief or to a petition for rehearing some additional or different evidence that is not part of the certified record, such as an affidavit or an unsworn statement. Such an effort, as well as any argument based thereon in the brief or petition has consistently been condemned by the Court. [Citations omitted.] *** The American Bar Association Project on Standards for Criminal Justice, §§5.9, 8.4(c)(Approved Draft, 1971), has labeled such efforts 'a grave violation of ethical standards' and has noted that 'most appellate courts deal promptly and severely with such violations.'" Stern and Gressman, Supreme Court Practice, 5th ed., 1978, pp. 716-17.

Appellant has no intention of getting into an affidavit war on these court minutes in an effort to explain how the court clerk made his error, but refers the Court to the clear and uncontradicted testimony of Judge Appleby and appellant Hinds referred to above.

ARGUMENT

I.

THE STATE URGES A LEGAL STANDARD AS TO LAWYERS THAT VIOLATES FUNDAMENTAL NOTIONS OF EQUAL PROTECTION.

At the heart of the state's brief lies the claim that lawyers are not to be accorded First Amendment rights equal to those of other citizens. "For First Amendment purposes, lawyers [are] distinguishable from other persons or groups..." (Rb20). "First Amendment rights," we are told, "must sometimes yield to

obligations arising from membership in the legal profession..." (id. at 19-12 to 14).

Citizens generally are entitled to the benefit of Justice Holmes's "clear and present danger" test. But lawyers, the state argues, are entitled to less: the "reasonable likelihood" test (Rb23 et seq.).

"The reason for making such a distinction," the state contends, is that lawyers have "obligations and duties different from those of ordinary citizens. These duties [are] not only to clients but also the court and public, and [are] designed to insure that the fairness of the judicial process not be impaired by 'extraneous influences.'" (Rb20-11 to 16). Lawyers, we are reminded, are "officers of the court" and must therefore criticize judges in "properly respectful terms" (id. at 17-13 to 14). The said "obligations [of attorneys] not imposed on other citizens," are characterized as "a condition of practicing law." Membership in the bar, we are told, "is a privilege burdened with conditions" (id. at 18-4 to 8, citing In re Rothman, 12 N.J. 528 (1953)).

The effort to distinguish attorneys from ordinary citizens on grounds such as urged by the state for purposes of depriving attorneys of constitutional protections equal to those supplied non-attorneys is not new. Indeed, in Cohen v. Hurley, 366 U.S. 117 (1961), the United States Supreme Court adopted just such an approach, using language and concepts strikingly akin to those of the state here. There the Court considered whether a state

could disbar an attorney for refusing, on grounds of privilege against self-incrimination, to answer questions of a state investigative body about professional misconduct. Id. at 118.

The Court, sustaining the disbarment, reasoned, as does the state here, that "membership in the bar" is a "privilege" and that the said privilege is subject to certain "conditions." "Whenever the condition is broken, the privilege is lost." Id. at 126; compare Rb18. The Hurley Court distinguished attorneys from average citizens:

> "Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the [state court] in another quite different capacity, also. As a lawyer he was 'an officer of the court ... with the inevitable consequence that the [state] court ... had its own right ... to strike his name from the rolls if he refused to cooperate." Ibid.; compare Rb17 and 20.

Hurley stood for everything the state argues here: lawyers could be singled out by the courts; they could be supplied less in the way of constitutional rights than average citizens if that enhanced their loyalty and sense of duty to the courts; such was the price of the privilege of bar membership, such was the condition of the status of "officers of the court."

Unfortunately for the state's position, Hurley was disavowed by the Court some six years after its arrival, in Spevack v. Klein, 385 U.S. 511 (1967). There the Court, again faced with a state bar disciplinary action brought against an attorney because he had invoked a privilege against self-incrimination, reversed a state court judgment disbarring the

attorney and concluded that "Cohen v. Hurley should be overruled" because "the Fifth Amendment ... extends its protection to lawyers as well as to other individuals." 385 U.S. at 514. In so ruling, the Court explicitly adopted the dissent in Hurley, ibid.

The Hurley dissent per Justice Black[5/] characterized the majority opinion there as holding that

> "lawyers have fewer constitutional rights than others. It thus places the stamp of approval upon a doctrine that, if permitted to grow, can go far toward destroying the independence of the legal profession and thus toward rendering that profession largely incapable of performing the very kinds of services for the public that most justify its existence."

366 U.S. at 135.

The dissent adopted by the Court in Spevack went on to hold that to subject attorneys to lesser constitutional protections violated the most fundamental principles of equal protection:

> "[T]he theory so casually but enthusiastically adopted by the majority constitutes nothing less than a denial to lawyers of both due process and equal protection of the laws as guaranteed by the Fourteenth Amendment.
>
> * * *
>
> "The majority recognizes, as indeed it must, that New York is depriving lawyers, because they are lawyers, of the full benefit of a constitutional privilege available to other people. But, instead of reaching the natural and, I think obvious conclusion that such a singling out of one particular group for special disabilities with regard to the basic privileges of individuals is in direct conflict with the Fourteenth Amendment, it chooses to defend this patent discrimination against lawyers..." Id. at 136.

5/ Dissents were also lodged by Justices Douglas and Brennan.

The Hurley dissent went on to note that withdrawal of full constitutional protections from lawyers deprives the nation of an important safeguard against tyranny - attorneys who publicly criticize, rather than toady to, the powers that be:

> "[T]he important role that lawyers are called upon to play in our society [makes] it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power. *** [O]ne of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people." Id. at 138-39.

In light of the Hurley dissent as adopted by Spevack, can it seriously be argued that lawyers in this state have the benefit only of a "reasonable likelihood" test while others are protected by the "clear and present danger" test? What possible reason is there to deprive lawyers of equal protection of the laws and the First Amendment, a deprivation that promises an obsequious and discredited bar?

It cannot seriously be argued, as the state attempts, that somehow the concerns of Sheppard v. Maxwell, 384 U.S. 333 (1965), compel a "reasonable likelihood" test (Rb25). It is surely true that preserving the integrity of the trial process

is a matter of great importance, and it may well be that speeches to the press by lawyers are more apt to pose a threat to the trial process than press statements by lay persons, but it does not follow from these premises that lawyers should have diluted First Amendment rights.

The integrity of the trial process can be preserved if the courts curtail speech that poses a clear and present danger of undermining that process. In making a determination of such danger, courts may take into account such facts as the status of the speaker, i.e., as lawyer associated with the case or lay person, the proximity of the speech to the trial in progress, the nature of the statements, etc. It is, however, one thing to take account of such facts in uniformly applying to all citizens, lawyers and lay persons alike, the constitutionally compelled clear and present danger standard. It is quite another thing to abandon that legal standard in favor of a less protective standard and single out lawyers for its application. To do so violates simple and fundamental principles of equal protection.

It should be added that the state's efforts to single out a group of citizens for lesser First Amendment protections because of their special characteristics, i.e., a lawyer's greater capacity to obstruct justice through speech because of greater influence on the public/ (see, e.g., Rb39-7 to 8), can when carried to a logical conclusion lead to absurd results. If lawyers can be singled out, why not other groups peculiarly capable to disrupting important state functions? Consider a black agitational speaker addressing a black audience in Newark's Central Ward about police brutality.

Consider, too, a white speaker on the same platform. Because of various facts, e.g., a cultural and political background in common with his audience, the black speaker is far more likely to trigger angry and possibly violent responses than the white speaker. Should the black speaker be subject to the reasonable likelihood test and the white receive the benefit of the clear and present danger test? It hardly need be argued that such an approach would constitute a grotesque violation of equal protection.[6/] To single out lawyers, however, because of their position in the system of justice is no less an affront to basic concepts of constitutional law.

It is appropriate to point out that Sheppard v. Maxwell,

6/ The whole point of speech is to be effective.

> "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger... That is why freedom of speech ... is protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil..." Terminiello v. Chicago, 337 U.S. 1 (1948).

It would indeed be anomalous if the characteristics of the speaker that render his speech effective, e.g., his status as an attorney, are used as a reason to lower his First Amendment rights.

> "If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public." Central Hudson Gas v. Public Service Comm., 447 U.S. 557 (1980) (Blackmun, J. concurring).

If the effect of Hinds's statements or any attorney's statements to the press is to arouse the public against features of the judicial system, that is no reason to proscribe such speech unless it poses a clear and present danger of obstruction of justice.

relied upon by the state as the source of its reasonable likelihood test, did not in fact apply that test to speech by lawyers. If one supplies the words omitted by the state in its quotation of Sheppard (Rb25), the true import of that test emerges:

> "But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." 384 U.S. at 363. (Emphasis added to words omitted by the state.)

Thus, the reasonable likelihood test of Sheppard was offered as a basis for determining whether or not to continue a case or change venue, two issues that do not implicate the First Amendment. While Sheppard urged "disciplinary measures" directed at "[c]ollaboration between counsel and the press ... affecting the fairness of a criminal trial," ibid., it intimated nothing about the nature of such regulations or the legal standard therefor. Sheppard, therefor, offers no justification for depriving attorneys of equal rights under the First Amendment.

The argument that lawyers are entitled to lesser constitutional rights than non-lawyers is at odds with literally every decision of the Supreme Court of the United States dealing with the constitutional rights of lawyers (except, of course, Cohen v. Hurley, which was overruled):

In re Ruffalo, 390 U.S. 544 (1968) (holding that a lawyer in the context of a disciplinary proceeding is entitled to the same procedural due process right, including fair notice of the charge, accorded any citizen); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (holding that a lawyer being denied state bar admission is entitled to the same procedural

due process rights - notice of charges and an opportunity to be heard - due any citizen); Baird v. Arizona, 401 U.S. 1 (1971) (holding that lawyers are entitled to the same First Amendment rights due other citizens in that they may not be penalized for political beliefs by exclusion from the bar); Bates v. State Bar of Arizona, 433 U.S. 350 (1977)(applying to bar disciplinary rules prohibiting lawyer advertising the same panoply of First Amendment commercial speech rights accorded other professions); In re R.M.J., 50 U.S.L.W.4185, 1/25/82 (applying to a state's regulation of lawyer advertising, First Amendment principles accorded all other commercial advertising, such as the requirement that the regulations "be narrowly drawn" and aimed at proscribing only false and misleading advertising, id., 50 U.S.L.W. at 4190; the Court relied upon Central Hudson Gas v. Public Service Comm., supra, 447 U.S. 557, which canvassed First Amendment principles in determining a corporation's commercial speech rights).

II.

THE STATE'S PRAGMATIC ARGUMENT IN FAVOR OF A "REASONABLE LIKELIHOOD" STANDARD FAILS.

In addition to arguing that the "reasonable likelihood" test is compelled as a condition of the privilege of practicing law, the state points to various pragmatic concerns which it considers compelling. The reasonable likelihood test is, we are told, easier to apply than the clear and present danger standard:

> "[T]he reasonable likelihood test is a better and more precise standard than that of a serious and imminent threat because it requires less speculation

> about which comments will adversely affect the administration of justice. *** Since the latter test specifies a higher standard to be met before speech can be regulated, it creates considerable uncertainty about whether a particular comment will satisfy its stringent proscriptions. The reasonable likelihood test, in contrast, does not make such speculative demands." (Rb27-28)

It is quite true, as the state contends, that the clear and present danger test demands greater scrutiny of speech than the reasonable likelihood test, which casts a broad prohibitive net. More difficult choices must indeed be made under the higher standard. But such difficulty by no stretch of the imagination compels the lower standard. It would after all be easier if lawyers were altogether forbidden to speak to the press. It would be easier still if there were no First Amendment at all. 7/

7/ In making its pragmatic argument the state relies on Hirschkop v. Snead, 594 F. 2d 356, 368 (4th Cir. 1979) (Rb27), which voiced pragmatic concerns similar to the state's. Oddly, that Court, in upholding the "reasonable likelihood test" considered that the clear and present danger test was applicable only in a very narrow range of circumstances: where there is a prior restraint imposed on speech, id. at 368; where a statute in the nature of California's Criminal Syndication Statute or the Federal Espionage Act of 1917 is sought to be enforced, id. at 369; or where a court attempts to exercise its contempt power against journalistic coverage of judicial proceedings, ibid. The state too attempts to limit the field of the clear and present danger test:

> "The clear and present danger test, historically arising from the punishment of newspapers, thus seems appropriately confined to that context alone." (Rb28)

Appellant is at a loss to understand either the Fourth Circuit's or respondent's efforts to limit the clear and present danger test to so narrow a field. Has not the United States Supreme Court applied the clear and present danger test or some variant thereof to attorneys criticizing judges? In re Little, 404 U.S. 553 (1972), did so, and in so doing relied upon, rather than distinguished, such cases as Craig v. Harney, 331 U.S. 367 (1947), involving a contempt proceeding against a newspaper. There is no basis whatever for limiting the clear and present danger test to the narrow field proposed by Hirschkop and the state.

III.

RESPONDENT MISSTATES THE NATURE OF HINDS'S COMMENTS IN AN EFFORT TO OVERCOME CLEAR PRECEDENT WHICH SUSTAINS A LAWYER'S RIGHT TO CRITICIZE THE FAIRNESS OF A JUDGE.

Appellant Hinds attacked the fairness of Judge Appleby. Attacks on the fairness of judges are the very substance of the Supreme Court cases upon which appellant relies, Bridges v. California, 314 U.S. 252 (1941); Craig v. Harney, 331 U.S. 367 (1947), and the other cases cited by appellant; and, as to lawyers, that is what In re Little, 404 U.S. 553 (1972), and Holt v. Virginia, 381 U.S. 131 (1965), are about. The impeachment trial of Judge Peck makes clear that lawyers may comment about judges outside of court, as well as in court. The limits of comments about the fairness of a judge are the same limits that apply to any comments about judicial proceedings - they must not present a clear and present danger of obstruction of the administration of justice.

Respondent, however, is not satisfied to deal with Hinds's comments for what they are. It seeks to characterize the comments as constituting an attack upon the "integrity" (Rb11) of a judge and then argues that In re Sawyer, 360 U.S. 633 (1959), implies that such attacks are censurable.

The whole point of the Sawyer case is that the Court refused to consider an attack upon the fairness of a judicial proceeding as constituting an attack upon the integrity of the judge. That point is clear enough in the prevailing opinion of Justice Brennan. It emerges ummistakeably in the dissenting

opinion of Justice Frankfurter, 360 U.S. at 669, who summarizes the comments of the lawyer in question as including the following, "He says that the very courtroom in which he walks to plead his case is a travesty," ibid.

Respondent's shifting use of words, its effort to read this case as constituting an attack upon "integrity" is nothing but an effort to obfuscate the facts of this case and to overcome the clear holdings that criticism of judges, even by lawyers, may not be punished except as it may present a clear and present danger of obstruction of justice.

Even where a lawyer attacks the integrity of a judge, the scope of First Amendment protection is far broader than that suggested by the state here. For what if it be true that a judge, for example, is a taker of bribes or otherwise lacking in integrity; is it possible, as the state sweepingly urges, that all attacks on the integrity of a judge, even when true, are beyond the pale of First Amendment protection? To so hold would re-establish seditious libel against the state, a crime extant under George III and, at one time, cf., Peter Zenger case, in the United States, a law that functioned to insulate public officials, including judges, from popular scrutiny.

As Justice Brennan remarked in New York Times v. Sullivan, 376 U.S. 254, 273 (1964), in referring to the Sedition Act of 1798:

> "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional... Jefferson, as President, pardoned those who had been convicted

> and sentenced under the Act and remitted their fines... These views reflect a broad concensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."

Even the Sedition Act did not set up a rule as Draconic as that urged by the state - it allowed truth as a defense.[8/] And it should be noted that when Holmes formulated the clear and present danger test he commented that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic," Schenk v. United States, 249 U.S. 49, 52 (1919)(emphasis added).

Indeed the drafters of the disciplinary rules understood that the principles of seditious libel could not be established as to judges, even in connection with attacks on their integrity. They, at least, provided truth as a defense. DR 8-102 provides:

> "Statements Concerning Judges and Other Adjudicatory Officers.
>
> (A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a person for appointment to a judicial office.
>
> (B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." (Emphasis added.) 9/

The ethics committee in this case took steps consciously

8/ See, New York Times, supra, at 274, and, generally, Chaffee, Free Speech in the United States (1941) 18-21.

9/ We do not believe that DR 8-102 can be extended beyond the range normally defined by traditional principles of defamation. To do so would raise serious constitutional issues. In fact DR 8-102, with its "knowingly false" standard, appears to be nothing more than an additional remedy for speech traditionally outside the protection of the First Amendment and generally reached by private actions in defamation.

and wilfully to evade the truth defense compelled by the history of seditious libel by charging Hinds under DR 7-107(D), known by one of its main members to be inapplicable. David Foley of that committee wrote:

> "This matter should again be reviewed by the committee before we determine whether or not to file a statement of charges and have a hearing. There does not appear to be any specific violation of DR 7-106 and DR 7-107. Nor does there appear to be a violation of DR 8-102, which deals with statements concerning judges. With regard to DR 8-102B, the rules state that 'a lawyer shall not knowingly make a false accusation against a judge.' If we proceed under this rule it would draw directly into question the truth or falsity of the statements made by Lennox Hinds which would, in essence, require us to determine the qualifications of Judge Appleby. This obviously we do not wish to do." (252a) (Emphasis added.)

Now the state writes, sensitive again to the inapplicability of DR 7-107(D), that "even if [Hinds] has been incorrectly charged, that has no effect on whether he can be disciplined. This Court has held that so long as the complaint in a disciplinary matter specifies the facts giving rise to the complaint, it is not necessary to specify the particular rules allegedly violated." (Rb46) Leaving aside the serious procedural due process problems posed by this approach, In re Ruffalo, supra, it must be stressed that the committee did not allege the known falsity of Hinds's statements. Thus, should the state contemplate a shift to DR 8-102, such a shift would then violate its own alleged principle as well as do violence to the First Amendment.

The First Amendment constitutes a judgment by the Founders of this nation that one legitimate avenue of redress to the failings and even corruption of governmental officials, including

judges, is by speech to the public at large. If an official is lacking in integrity, of course traditional legal channels may be pursued. But public opinion may also be pursued and notwithstanding the state's efforts here, speech in criticism of a public official is not punishable unless it presents a clear and present danger to some function which the state has the right to protect. As to statements against public officials of a defamatory nature, knowing falsity would minimally be required in addition to malice (New York Times, supra) in order to base civil or punitive action against a speaker.

IV.

MISCELLANEOUS REPLIES TO RESPONDENT'S BRIEF.

Space does not permit a full discussion of various points of respondent's brief not examined above. Some brief discussion is however in order.

a) Respondent's effort to draw a legally significant distinction between bar discipline cases and contempt cases fails.

Respondent claims that in arguing for broad First Amendment protection for lawyers' criticism of judges, appellant has over-used cases arising in the context of contempt convictions, such as Craig v. Harney, 331 U.S. 367 (1947), and Bridges v. California, supra. Those cases, respondent says, have little precedential significance for bar disciplinary proceedings. If in the name of the First Amendment one charged with contempt is acquitted, it only means, according to the state, that there was a failure of proof beyond a reasonable doubt - a matter of little significance in disciplinary proceedings which have a lower

standard of proof (Rb14-15). The state misreads appellant's reliance on the contempt cases. They are cited and analyzed for the legal standard applicable in connection with lawyers' speech, to wit, the clear and present danger test (see, e.g., discussion of Bridges in appellant's brief in chief at 18). Whatever the standard of proof in a legal proceeding, be it reasonable doubt or clear and convincing evidence, the substantive legal standard as to what acts are punishable, i.e., speech posing a clear and present danger, does not change and cases establishing that standard are of the greatest relevance here.

b) Certain of the state court cases cited by respondent are of little merit.

Respondent cites several state cases in support of its contention that DR 1-102(A)(5) is not impermissibly vague. Respondent cites and quotes Matter of Keiler, 380 A. 2d 119 (D.C. 1977), and Committee on Professional Ethics v. Durham, 279 N.W. 2d 280 (Sup. Ct. Iowa 1979), for the proposition that "although a 'reasonable person' might not understand what ... [DR 1-102A] proscribed a 'reasonable attorney' would so understand," (Rb50-51).

We do not consider that a "reasonable attorney" can know from the blanket prohibition of DR 1-102(A)(5), proscribing conduct "prejudicial to the administration of justice," what he may or may not say. Nor does the state specify in its brief precisely what is proscribed thereby, though it claims to know, as reasonable attorneys would, the contours of the prohibition. In this regard we are reminded of the words of Saint Augustine,

then Bishop of Hippo, in his Confessions, describing his difficulty in explaining or defining the concept of time: "Si nemo ex me quaral, scio; si quarenti explicare velim, nescio - If no one asks it from me, I know it; if I wish to explain it to one who asks it, I do not know."

We think more specificity is required of a disciplinary rule if it is not to be deemed impermissibly vague. See, Justice Holmes in McBoyle v. United States, 283 U.S. 25, 27 (1931).

We might add that Hirschkop v. Snead, 594 F. 2d 356 (4th Cir. 1979), repeatedly cited by respondent in its brief, relied on traditional vagueness principles, not special rules tailored to the "reasonable lawyer" in finding DR 7-107(D) impermissibly vague insofar as it

> "prohibits a lawyer participating in a criminal trial from making any statements about 'other matters that are reasonably likely to interfere with a fair trial.' This proscription is so imprecise that it can be a trap for the unwary. It fosters discipline on a subjective basis depending entirely on what statements the disciplinary authority believes reasonably endangers [sic] a fair trial. Thus neither the speaker nor the disciplinarian is instructed where to draw the line between what is permissible and what is forbidden. Cf. Winters v. People of the State of New York, 333 U.S. 507 (1948)." Id. at 371.

CONCLUSION

The disciplinary proceeding against Lennox S. Hinds should be dismissed, and the Court should determine that DR 1-102(A)(5) and DR 7-107(D) are unconstitutional on their face.

Dated: Hoboken, N.J.
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Counsel wish to acknowledge the valuable assistance of Elizabeth C. Yeampierre, a student intern at the Center for Constitutional Rights, in research in connection with the preparation of this brief.

Opposition

NO. 81-460

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,
Petitioner,

vs.

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Counter-Statement of Questions Presented

1. Was not a United States District Court required affirmatively to exercise its jurisdiction (against a claim of abstention) when properly called upon in an action under 42 U.S.C. §1983, to determine serious questions under the First and Fourteenth Amendments arising out of the initiation of lawyer-disciplinary proceedings by a local committee under regulations claimed to be unconstitutional on their face and as applied, where—

> a) the state disciplinary procedure provides for three levels of consideration culminating in its Supreme Court, the first two levels consisting of a local investigative body which determines whether to prosecute before a state-wide disciplinary body, both bodies including lay persons and neither body having judicial power or any jurisdiction to consider constitutional issues;
>
> b) the state procedure provides no opportunity to raise and have timely decided by a competent judicial tribunal the constitutional issues sought to be raised by the object on the proposed discipline;
>
> c) no adjudicative proceedings of any nature have occurred within the state in respect to the case in question and the sole action taken is that the local investigative body has announced a hearing to determine whether it wishes to make a charge?

2. Is not the predicate for any claim that a United States District Court should, under *Younger* v. *Harris*, abstain from a determination of constitutional issues as they arise in a pending state proceeding, that the state forum provide an opportunity to raise and have timely

decided by a competent judicial tribunal the constitutional issues presented?

3. Is not *Younger* v. *Harris* abstention applicable only to state judicial proceedings (and perhaps administrative proceedings having judicial aspects) and inapplicable to proceedings within the prosecutorial arm of state government which is seeking to determine whether a charge or presentment shall be made against an individual?

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MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

The respondents—Garden State Bar Association, the New Jersey Association of Black Women Lawyers, the National Conference of Black Lawyers, and Lennox S. Hinds—oppose the granting of a writ of certiorari.

Petitioner has suggested to the Court that the decision of the Third Circuit departs from this Court's decision in *Younger* v. *Harris*. In fact the decision below reflects meticulous adherence to familiar principles enunciated by this Court which balance the jurisdictional responsibilities of the federal courts to protect constitutional rights with their equally important duty to avoid interference with ongoing state judicial proceedings.

The context in which this case arises is a three-tiered lawyer disciplinary procedure adopted by the Supreme Court of New Jersey, effective in 1978. Under those rules, disciplinary proceedings against lawyers in New Jersey start with an investigation by a district committee which, after a hearing, determines whether to make a "presentment" or charge to a statewide disciplinary committee. The statewide committee, considering the matter *de novo*, adjudicates it and makes a recommendation to the Supreme Court. Both the district committee and the statewide committee include lay persons.

The Supreme Court exercises ultimate appellate and supervisory power and makes the final decision.

The New Jersey three-tier system is obviously designed for the purpose of insulating the Supreme Court from the initial stages of the disciplinary process. Before this Court, however, New Jersey adopts a wholly different posture. Here it argues that even at the lowliest and most preliminary level of the prosecutorial process its

Supreme Court is operating *in proprio persona* and therefore a turn to the federal court to protect constitutional rights constitutes an interference with that Court.

The Court of Appeals identified as one of the key issues in this case the non-availability of a certain and speedy process for having a state adjudication of the constitutional issues— a *sine qua non* of any claim that a federal court should abstain. In arguing for abstention in this case the State is pressing for a radical extension of principles of abstention which would effectively bar federal courts from providing protection against the denial of constitutional rights, because of the pendency of any kind of investigative or prosecutorial state proceeding and despite the absence of a judicial mechanism for a speedy and certain determination of constitutional issues.

Additionally in this case the State is arguing for application of principles of abstention at the prosecutorial level of state disciplinary procedures. In do doing the State would have this Court ignore its recent opinion in *Supreme Court of Virginia* v. *Consumers Union of the United States,* 446 U.S. 719 (1980), where the Court carefully delineated the separate functions of state courts in the regulation of lawyers, *i.e.,* legislative, judicial, and prosecutive. As to the occasions when the courts exercise their prosecutive role, this Court emphasized the propriety of federal court intervention where constitutional rights are threatened. 446 U.S. at 763.

Though the State seeks to use this case as a springboard for effecting radical changes in settled principles of federal jurisdiction, the case itself is of extremely narrow application and hardly an appropriate vehicle for the kind of attack the State espouses. Perhaps the clearest indication of the narrowness of the decision of the court below as its own statement (Pet. App. 21a) that it

well understood the special concern of state courts with disciplinary proceedings against lawyers and that it was in no way repudiating its earlier decision in *Gipson* v. *New Jersey, Supreme Court*, 558 F. 2d 701 (3rd Cir. 1977). The Court of Appeals made clear that it was acting only because of the "particular circumstances of this case" (*ibid.*).

Counter-Statement of the Case

In January 1977, Lennox S. Hinds was the Director of the National Conference of Black Lawyers. That organization was committed to the elimination of racism in all aspects fo American life, including such as may be found wthin the legal system.

In his capacity as director, Hinds was required to attend or call press conferences across the United States with respect to various judicial proceedings, monitoring those proceedings and speaking out at press conferences and other public assemblies on any matters relating to the organization's concern about racism.

In the performance of his duties on January 20, 1977, Hinds called a press conference at which he made certain comments about the impending criminal trial of Joanne Chesimard, also known as Assata Shakur. As spokesperson for the National Conference of Black Lawyers he expressed the view that the trial was affected by racism. He said that the trial was a "travesty" and that Judge Appleby "did not have the judicial temperament and racial sensitivity to sit as an impartial judge." Hinds also stated that the way Judge Appleby was questioning

the jurors was leading to the creation of a "kangaroo court."[1]

Mr. Hinds was not representing Chesimard in the criminal case before the New Jersey court and one of the newspaper articles so reported. As noted by the Third Circuit, the article accurately stated that:

> "Hinds had represented Joanne Chesimard 'in a separate federal civil suit challenging the conditions of her isolation cell confinement in the Middlesex County Jail but is not a member of the five-lawyer defense team' in the criminal trial." (Pet. App. 4a)

Surprisingly, in the statement of the case presented by the State to this Court, this news item is omitted though others are quoted. Indeed at no place in the petition does the State mention the undisputed fact that Hinds was not one of Chesimard's defense lawyers—a fact of enormous legal consequence.

The case against Lennox Hinds was generated and developed by one David Foley, a member of the Middlesex County Ethics Committee. He requested his committee to be permitted to investigate Hinds and that request was granted. His investigation consisted only of talking by telephone to two reporters and corresponding with a broadcasting institution that had a tape of the interview. He spoke to no one associated with the Chesimard trial: not the Judge, not the prosecutor, nor any of defense counsel.

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[1] The foregoing is from Hinds's undisputed testimony before the District Court. His version is slightly different from that reported in the press but the difference is irrelevant for the purposes of this proceeding.

While he was considering the case Mr. Foley wrote a memorandum to his own file in which he stated:

> "There does not appear to be any specific violation of DR 7-106 and DR 7-107 . . . DR 7-107D speaks about lawyers making extra judicial statements about 'other matters that are reasonably likely to interfere with a fair trial.' Also DR 1-102A5 states that 'lawyers shall not engage in conduct that is prejudicial to the administration of justice.' These last two DRs are very general in scope and I do not believe that they are intended to cover the conduct that is here in question."

Despite his own memorandum, Foley recommended to his colleagues that charges be filed against Hinds, alleging violations of DR 1-102(a)(5) and DR 7-107(D).[2] Both rules are set forth at Pet. 3. Foley's committee granted his request and charges were filed against Hinds to the effect that he had violated two of the disciplinary rules that Foley mentioned in his memorandum.

On February 10, 1978, Hinds, together with three black bar associations, filed in the United States District Court for the District of New Jersey a verified complaint praying for injunctive and declaratory relief. The complaint asserted that the disciplinary rules sought to be applied against Hinds were unconstitutional on their face and as applied. The three organizations joined Hinds in the action because their members view themselves as having a unique responsibility to combat racial discrimination in the courts. Additionally, the organizational plaintiffs

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[2] In depositions and again at a hearing before the District Court Judge, Foley claimed that his memorandum was a "typographical" error.

viewed the actions of the Middlesex County Ethics Committee as creating a chilling effect upon the exercise of First Amendments rights of each of their members and officers.

The District Court granted the Ethics Committee's motion to dismiss based upon *Younger* v. *Harris*, 401 U.S. 37 (1971). Thereafter, at the request of Hinds and the other plaintiffs, that court reopened the matter to consider the plaintiffs' contention that there had been bad faith in the prosecution. Ultimately the District Court ruled that the plaintiffs had failed to sustain their burden on that score. The District Court, however, stayed the disciplinary proceedings pending appeal.

The Court of Appeals reversed, holding that:

> "We hold only that in the particular circumstances of this case, the predicate for *Younger* abstention —'the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved,' *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973)—is lacking. Inasmuch as the state proceedings have not yet reached a stage at which Hinds' constitutional claims may be adjudicated, and because delay may chill the exercise of his first amendment rights, we find that abstention is inappropriate in this case." (Pet.App. 21a)

The Court of Appeals also analyzed in great detail the disciplinary procedures of New Jersey and, applying the Court's analysis in *Supreme Court of Virginia* v. *Consumers Union of the United States*, *supra*, concluded

> "that the proceedings before the District Ethics Committee fall within the prosecutorial phase of

> New Jersey's disciplinary proceeding" (Pet. App. 17a-18a),

and that abstention was accordingly inappropriate under *Steffel* v. *Thompson*, 415 U.S. 452 (1974) (*id.* at 19a).

A petition for rehearing was filed, to which was appended an affidavit by the Clerk of the Supreme Court of New Jersey. The affidavit in essence indicates that the Supreme Court of New Jersey was, as of the time of the affidavit, willing to determine the constitutional issues and that it was furthermore considering amending its rules as to interim raising of constitutional issues. As the petition points out (Pet 17), these rules were in fact amended effective September 14, 1981, to make provision for discretionary interlocutory review of constitutional issues by the Supreme Court in the course of disciplinary proceedings.

The petition for rehearing was denied. The Court of Appeals pointed out that "in reversing a district court decision to abstain, the relevant facts are those which existed at the time of the district court's decision" (Pet. App. 33a). As of that time, the Court of Appeals observed, there was no rule or procedure "which would have insured judicial consideration of Hinds' constitutional claim" (Pet. App. 53a).

New Jersey's Three-Tiered System for Diciplining Lawyers

Critical to any determination of a demand that the federal court abstain is a determination of the nature of the proceedings for which abstention is sought. The Court of Appeals meticulously described New Jersey's three-tiered procedure in its opinion. See Pet. App. 7a-9a.

In brief, New Jersey has established district committees composed of lawyers and lay persons[3] to receive complaints against lawyers and determine whether any proceedings should be undertaken. A district committee may conduct hearings, as a result of which it may determine to propose a letter of private reprimand or, if a reprimand is considered to be insufficient discipline, it may prepare a "presentment" or charge, in either case for consideration and adjudication by a statewide disciplinary board.

The statewide disciplinary board, also composed of lawyers and lay persons,[4] makes a *de novo* review of the entire matter on the record and may adjudicate that a reprimand shall be given. If the board is reviewing a "presentment," it hears oral argument in addition to reviewing the record *de novo* and then renders a formal decision which includes findings of fact and conclusions and specific recommendations to the Supreme Court of New Jersey as to disciplinary action, if any, which should be imposed.

Finally, the entire matter is ultimately adjudicated by the Supreme Court of New Jersey. If the recommendation is for disbarment or suspension for more than a year, briefing and oral argument are allowed as a matter of course. In case a lesser penalty is recommended leave must be sought for the filing of briefs and/or oral argument.

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[3] The district committee must include at least two non-lawyers out of a committee of eight or more (N.J.R. 1:20-2(a)).

[4] Non-lawyers are required to be at least 33⅓%, and up to 44½% of the total membership of the statewide committee (N.J.R. 1.20-3(a)).

ARGUMENT

I.

Respondent presented serious constitutional issues within the jurisdiction of the District Court to determine.

At this stage of the proceedings it is clear that the constiutional issues are not ready for determination by this Court. Novertheless, in considering the question of abstention the Court should note the seriousness of the constitutional issues.

This Court has long established that lawyers too are entitled to constitutional rights, *Spevack* v. *Klein,* 385 U.S. 511 (1967); that disciplinary procedures are quasi-criminal, *In re Ruffalo,* 390 U.S. 544 (1968); and that lawyers are entitled to procedural and substantive rights therein, *Baird* v. *State Bar of Arizona,* 401 U.S. 1 (1971); *cf., Willner* v. *Committee on Character & Fitness,* 373 U.S. 96 (1963), as to admission to the bar.

The disciplinary rules in question here present familiar constitutional issues.

1) DR 1-102 is a general statement that "a lawyer shall not . . . engage in conduct that is prejudicial to the administration of justice." No conduct is defined. The most obvious constitutional issues of vagueness and overbreadth arise when a state seeks to use such a general hortatory expression as a basis for discipline.

2) DR 7-107(D) purports to prohibit lawyers "associated with the prosecution or defense of a criminal matter" from making any extrajudicial statement "during the selection of a jury or the trial of a criminal matter" that relates to "the trial, parties, or issues in the trial or other

matters that are reasonably likely to interfere with a fair trial."

In connection with these rules the respondents raised issues of constitutionality, both facial and as applied.

a) The issue of facial unconstitutionality may be summarized as follows:

In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), this Court suggested that rules might be adopted to curb lawyers who make public statements about their cases. The American Bar Association, responding to that suggestion, appointed a committee which in 1968 developed proposed standards. See *ABA Fair Trial/Free Press* (1968). New Jersey adopted these proposals as did many other states.

Subsequent litigation has indicated that the standards in their original form have constitutional deficiencies, particularly in the area of the First Amendment. See, *Chicago Council of Lawyers* v. *Bauer*, 522 F. 2d 242 (7th Cir. 1975), cert. den. 427 U.S. 912 (1976); compare, *Hirschkop* v. *Snead*, 594 F. 2d 356 (4th Cir. 1979).

The entire matter was reviewed by the American Bar Association Fair Trial and Free Press Committee which in 1978 proposed revisions of the standards that were adopted by the Association in the summer of that year. The most critical change was that which required that in order that the lawyer's speech be subject to prohibition it must be such as to "pose a clear and present danger to the fairness of the trial." The discussion in the 1978 ABA report indicates the seriousness of the constitutional issues presented by the old standards. The Supreme Court of New Jersey has not yet modified its disciplinary rules on this score.

b) The issue of unconstitutionality as applied may be summarized as follows:

Hinds was acknowedgedly not a lawyer involved in Joanne Chesimard's trial. It may be that under properly drafted rules a lawyer involved in a litigation may be curbed from talking about it. Clearly, however, lawyers as a class may not, because of their occupation, be singled out for limitations upon their out-of-court speech and not involving their own litigation. See, *In the Matter of the Justices of the Appellate First Department* v. *Erdmann*, 33 N.Y. 2d 559, 347 N.Y.S. 2d 441 (1973). The honored role of lawyers as outpsoken critics of the administration of the law was recognized in the impeachment trial of Judge Peck, leading to the enactment of 18 U.S.C. §401. See, *Nye* v. *United States*, 313 U.S. 33, 45 (1951); *Bridges* v. *California*, 314 U.S. 252, 266 (1941); *Cammer* v. *United States*, 350 U.S. 399, 406 (1956). It would require an enormous wrench of constitutional doctrine to permit speech restraints upon lawyers as a class except under the narrow circumstances suggested by *Sheppard* v. *Maxwell, supra. Cf., Gulf Oil Co.* v. *Bernard*, —— U.S. ——, 68 L. Ed. 2d 693 (1981).

II.

The predicate for the application of *Younger* v. *Harris* abstention—the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved—was completely lacking in the New Jersey disciplinary procedure as of the time the federal action was commenced.

The central thesis of the petition is that, because the case involves a bar disciplinary proceeding, the federal court should abstain from determining federal constitutional issues. A line of cases is cited (Pet. 13, *et seq.*) for the support of a general proposition that "it would be particularly disruptive to the special relationship between the state courts and members of their bars for federal courts to interfere with or enjoin state bar disciplinary proceedings" (Pet. 14).

Petitioner would have the Court ignore the special and somewhat unusual structure that New Jersey has recently created for disciplining its lawyers. No longer is the disciplinary process under the close and immediate supervision of the courts; no longer is the disciplinary process administered solely by judges and lawyers. Lay persons are a part of a complex three-tiered structure, at the distant pinnacle of which sits the Supreme Court of New Jersey which may not even hear argument in a case unless discipline of a particularly severe nature is recommended.

Only last year this Court in *Supreme Court of Virginia* v. *Consumers Union of the United States*, *supra*, cut through many of the unanalyzed assumptions surrounding the functioning of state judicial systems. It pointed out that at times these courts exercised legislative and prose-

cutive functions in addition to performing their normal judicial role.

Here the petitioner would have the Court ignore the actual structure of New Jersey's disciplinary procedure and view it as if the Supreme Court of this state were hovering over every step of its operation, so that any federal intervention at the levels of the lowliest district committee is to be viewed as a direct interference with the highest court of the state. The realities of New Jersey's disciplinary procedure bear no resemblance to that portrayal presented in the petition, and it is those realities that must govern the application of principles of abstention. Despite the picture sought to be presented that a filing of a complaint with a district committee "is in effect a filing with the Supreme Court" (Pet. 16), petitioner admitted in its petition for rehearing filed with the Court of Appeals that "[p]rior to this time [March 9, 1981, some two weeks after the Court of Appeals rendered its decision] the specifics of the Constitutional claim advanced by Lennox Hinds had not been brought to the attention of this Court [the New Jersey Supreme Court]." Hinds had raised his constitutional issues more than three years previously.

"Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Construction District* v. *United States*, 424 U.S. 800, 813 (1976). Indeed, "abstention is an extraordinary and narrow exception to the *duty* of a District Court to adjudicate a controversy properly before it," *ibid.*, quoting from *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 188-89 (1959) (emphasis supplied).

Abstention is not a means of defeating or putting off the opportunity for adjudication of a constitutional claim. It is rather a method of permitting a state court in a pend-

ing proceeding before it to continue with its process and adjudicate constitutional issues without inerference by a federal court.

The *sine qua non* then of abstention is that the litigant will be able to vindicate the constitutional claims in the pending state proceeding.

After analyzing the disciplinary procedural structure available in New Jersey the Circuit Court found it did not provide for "a concrete opportunity to vindicate his constitutional rights," quoting from *Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974) (Pet. App. 10a). The opinion of the Third Circuit clearly demonstrates that such a requirement has consistently been identified by this Court as a pre-condition of abstention (Pet. 10a-11a).

The State's answer is two-fold, and on both scores the State is plainly wrong.

a) The State suggests that there is some body of general law that federal jurisdiction to protect constitutional rights is somehow not available in the context of lawyer disciplinary proceedings and then presents a string of citations purportedly so holding (Pet. 13). Those cases, however, carefully read, show, as pointed out by the Court of Appeals, that "the state proceedings had already reached the stage where the state courts were involved in considering the merits or had already been involved in some preliminary proceedings" (Pet. 15a).

There is a vast gap between this case, arising as it does in the structure of New Jersey's three-tiered system, including lay persons, and those for which federal courts have abstained. Perhaps the distinction is most clearly evident by contrasting the instant case with *Gipson* v. *New Jersey, Supreme Court, supra*, which the Court of Appeals was careful to note it was in no way "repudiating."

The Court of Appeals demonstrated the distinction, as follows:

> "The state relies on our decision in *Gipson* v. *New Jersey, Supreme Court*, 558 F. 2d 701 (3d Cir. 1977) (per curiam). In *Gipson*, a New Jersey attorney who was being investigated for improper handling of client funds was temporarily suspended by the New Jersey Supreme Court for failure to produce material subpoenaed by the County Ethics Committee. Following his suspension, Gipson commenced a federal court action in which he challenged the constitutionality of the state's rules of attorney discipline. We held that under those circumstances, federal non-interference was appropriate, stressing that 'the question of Mr. Gipson's suspension *is still pending in the state court.*' *Id.* at 704 [emphasis added by the Court of Appeals]. Gipson's case was already the subject of a state court action at the time the federal proceeding had been initiated. He had already filed a motion to quash the subpoena, which was considered by the New Jersey Supreme Court, and had been afforded oral argument before the Supreme Court on the issue of the propriety of suspension. It is evident that the Supreme Court of New Jersey proceeding afforded Gipson ample opportunity for adjudication of his constitutional claim, and therefore that case does not, as the state claims, control disposition of this appeal." (Pet. App. 14a-15a)

In similar fashion, the Court of Appeals distinguished *Erdmann* v. *Stevens*, 458 F. 2d 1205 (2nd Cir.), cert. den. 409 U.S. 889 (1972), by pointing out that it was the justices of the Appellate Division who had directly initiated the bar proceedings (Pet. App. 16a).

The Court of Appeals properly distinguished the various cases cited by petitioner by pointing out, as noted above, that the *Courts* of the various states had already been involved in the proceedings when the federal lawsuit had been filed. It also noted (Pet. App. 15a, fn. 9) that:

> "Many of the courts considering abstention in the context of disciplinary proceedings have not focused on the stage of the proceeding and have not discussed the attorney respondent's opportunity to press the constitutional claims at that stage."

We add one further point of distinction: It does not appear that in any case cited by petitioner the federal court discussed abstention in favor of a non-judicial body that included lay persons, as the State here seeks.

General principles of abstention are as applicable to attorney discipline cases as they are to any other body of litigation. Where, as the Court of Appeals found here, there is no timely opportunity in the state proceedings to raise and have decided federal constitutional questions, there is simply no basis for abstention.

b) The State argues that in fact the constitutional issues could have been litigated in the then pending proceeding before the Middlesex County Ethics Committee if Mr. Hinds had filed a motion before the Supreme Court to obtain an interlocutory adjudication (Pet. 18). In support of such a suggestion the State cites two cases from a period before the new disciplinary rules were adopted, *Gipson* v. *New Jersey, Supreme Court, supra,* and *In re Logan,* 70 N.J. 222 (1976). Both cases are irrelevant, not only because they related to the prior and wholly different procedures for New Jersey discipline but also because both cases had already been before the Supreme Court of New Jersey. In *Gipson* the case was before the state Su-

preme Court on a motion by the ethics committee for suspension. In *Logan* the case was before the Supreme Court of New Jersey, not by interlocutory motion but rather upon final hearing after the proceedings before the local disciplinary committee had been concluded. It is the sheerest fantasy to assume that under the existing rules at the time this proceeding was underway, the New Jersey Supreme Court would have interrupted proceedings at the level of the district ethics committee to weigh the constitutional questions sought to be raised by Hinds.[5] The only provision in the rules, effective prior to September 14, 1981, in respect to interlocutory relief was that permitting such an approach to the Supreme Court of New Jersey to bring about a temporary suspension.

The States seems to assume (Pet. 18, fn.) that the *possibility* of obtaining judicial determination of the constitutional issues at the state level, if the Supreme Court should exercise its discretion to permit interlocutory re-

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[5] This contention was for the first time presented by the State in its Petition for Rehearing. Respondents in their opposition to the Petition informed the Court of Appeals of efforts that Hinds had in fact made to have the State Disciplinary Review Board look into the fact that the American Bar Association had recommended amendment of the rules with respect to extra-judicial statements of lawyers. Counsel for Hinds had specifically suggested that "some agency within the State with responsibility for enforcement of the ethical standards of New Jersey lawyers might concern itself with whether the proceedings undertaken by the Middlesex County Ethics Committee are not plainly ill advised." It was suggested "that if some superior authority were to look into this matter, the State might be saved a good deal of embarrassment and Mr. Hinds a good deal of needless litigation."

The response was that the Disciplinary Review Board would do nothing about these suggestions "until such time as the Federal litigation is concluded."

view, satisfies all requirements of abstention even though it is clear that such issues may not be considered by either the district disciplinary committee or the statewide disciplinary review board. This Court, however, has already considered and rejected a closely parallel suggestion. In *Gibson* v. *Berryhill,* 411 U.S. 564 (1973), where it was clear that the federal plaintiff could not have his constitutional claims fairly considered by the administrative agency, this Court rejected abstention and said:

> "Nor, in these circumstances, would a different result be required simply because judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceedings." 411 U.S. at 577.

The State says that all that is required is the "opportunity *to raise* the constitutional claims" (Pet. 18, fn., emphasis in original). This Court, however, spoke quite differently in *Gibson* when it referred to "the opportunity to raise *and have timely decided*" by a competent state tribunal the federal issues involved (emphasis supplied).

III.

The state proceedings in the instant case were at the prosecutive stage and principles of abstention are inapplicable thereto.

Relegated to a footnote in a petition (Pet. 19) is the second prong of the decision of the Court of Appeals, namely, that the proceedings before the district ethics committee were within the "prosecutorial phase of New Jersey's disciplinary proceeding" (Pet. App. 18a) and that the adjudication process had not yet begun. The Court of Appeals

carefully pointed out that the purpose of abstention was to avoid "reflecting negatively upon the state court's ability to enforce constitutional principles" and accordingly abstention is "inapplicable when a state court proceeding had not yet begun." (Pet. App. 19a)

Though it does not acknowledge any issue as to the stage of the state court proceedings for which abstention is sought, the State argues that from the moment that a mere district committee starts its investigatory process the Supreme Court of New Jersey is itself involved (Pet. 16). But the Court of Appeals quite properly pointed out that recently this Court in *Supreme Court of Virginia* v. *Consumers Union, supra,* analyzed state bar disciplinary proceedings and "divided such proceedings, even though carried out entirely under the aegis of the state judiciary, into legislative, adjudicative, and prosecutorial phases" (Pet. App. 7a). Without determining where the adjudicative process actually commences in New Jersey's three-tiered system (as between the state disciplinary review board or the Supreme Court), the Court of Appeals makes absolutely clear that the district disciplinary committee has no adjudicative function.

This Court in *Consumers Union, supra,* noted that:

> "Prosecutors are natural targets for Sec. 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law . . . If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed . . ." 446 U.S. at 737.

The analysis by the Court of Appeals, showing that this case is in the prosecutive and not the judicial stage, is not subject to serious dispute. In the light of this Court's opinion in *Consumers Union* it is irrelevant whether the case can be considered within the general penumbra of the Supreme Court of New Jersey.

CONCLUSION

The petition for writ of certiorari should be denied.

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Petitioner's Brief

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NO. 81-460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,
Petitioner,

vs.

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,
Respondents.

BRIEF FOR PETITIONER

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Questions Presented

1. Did the court of appeals err in permitting federal intrusion into an ongoing State bar disciplinary proceeding which involves the extremely delicate and unique relationship between a State court and the attorneys practicing before it and which provides an ample forum for the resolution of all issues including federal constitutional issues?

2. Is a State bar disciplinary proceeding a "pending State action," as contemplated by the *Younger* doctrine of non-interference, when the matter is before an ethics committee established by the Supreme Court of New Jersey to assist it in adjudicating possible infractions of the disciplinary rules and when the supreme court has full control over such proceedings?

3. Is the Supreme Court of New Jersey a competent State tribunal to adjudicate the constitutionality of disciplinary rules adopted by it?

4. Did the court of appeals err in failing to construe the New Jersey Court Rules as those rules have been construed by the Supreme Court of New Jersey?

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Cases Cited

American Civil Liberties Union v. Bozardt, 539 F. 2d 340 (4th Cir.), *cert.* denied, 429 U.S. 1022 (1976) 15, 20, 33

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American Trial Lawyers v. N.J. Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974) 25, 26

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NBC, In re, 64 N.J. 476, 317 A.2d 695 (1974) 25

New Jersey-Philadelphia Presbytery v. New Jersey State Board of Higher Education, 654 F.2d 868 (3rd Cir.), reh. denied, —— F.2d —— (3rd Cir., No. 80-1253, May 27, 1981) 14, 17

Niles v. Lowe, 407 F.Supp. 132 (D. Hawaii 1976) 20, 33

Philip J. LiVolsi, In the Matter of the Application of, 85 N.J. 576, 428 A.2d 1268 (1981) 25

Phillips v. Pennsylvania Higher Education Assistance Agency, 657 F.2d 554 (3rd Cir. 1981) 14, 17

Rosenthal v. Carr, 614 F.2d 1219 (9th Cir.), *cert.* denied, 447 U.S. 927 (1980) 20, 33

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Seraphim v. Judicial Conduct Panel, 483 F.Supp. 295 (E.D. Wis. 1980) 33

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Tedesco v. O'Sullivan, 420 F.Supp. 194 (D. Conn. 1976) 20

Tepper v. State Bar of Wisconsin, 489 F.Supp. 115 (E.D. Wis.), aff'd, 636 F.2d 1222 (7th Cir. 1980) 20, 33

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Trainor v. Hernandez, 431 U.S. 343 (1977) 19, 22, 28, 34

Williams v. Red Bank Bd. of Education, —— F.2d —— (3rd Cir., No. 81-1275, decided October 26, 1981) 19

Younger v. Harris, 401 U.S. 37 (1971) .....i, 8, 10, 13, 15-23, 27-34

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New Jersey Constitution Cited

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NO. 81-460

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MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,

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GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,

Respondents.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 643 F.2d 119 (3rd Cir. 1981) and is appended to the Petition for Certiorari as Appendix A. The opinion sur petition for rehearing of the United States Court of Appeals for the Third Circuit is reported at 651 F.2d 154 (3rd Cir. 1981) and is included as Appendix B to the Petition for Certiorari. The judgment of the United States Court of Appeals for the Third Circuit in this case appears as Appendix C to the Petition for Certiorari. The unreported opinions of the United States District Court appear as Appendix D and Appendix E to the Petition for Certiorari.

Jurisdiction

The opinion of the United States Court of Appeals for the Third Circuit was filed on February 24, 1981. A timely petition for a rehearing was denied and an opinion sur petition for rehearing was filed on May 12, 1981. The judgment of the United States Court of Appeals for the Third Circuit was issued on May 20, 1981. By order of Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, entered on July 31, 1981, the time to file the petition for writ of certiorari in this matter was extended from August 10, 1981 to and including September 9, 1981. The petition for writ of certiorari was filed on September 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) to review a judgment of the court of appeals. Certiorari was granted on November 2, 1981.

Regulatory Provisions Involved

This matter involves two disciplinary rules adopted by the Supreme Court of New Jersey to govern the conduct of attorneys admitted to practice before it. DR1-102(A)(5) prohibits an attorney from engaging in conduct which is "prejudicial to the administration of justice" while DR7-107(D) provides:

> "During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that he expects to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case."

Also implicated in this case is New Jersey Court Rule 1:20 which establishes the procedures to be followed in disciplining attorneys admitted to practice in the State of New Jersey.

Statement of the Case

This case involves federal court intervention in an ongoing State bar disciplinary proceeding against an attorney admitted to practice in the State of New Jersey.

The circumstances of this case are rooted in the criminal trial of Joanne Chesimard (also known as Assata Shakur) who was charged with the murder of a New Jersey State Trooper. During the selection of the jury in the

Chesimard trial, a press conference was called by Lennox Hinds, a New Jersey attorney. The conference, held on January 20, 1977, concerned the conduct of the trial and more specifically that of the trial judge, the Honorable Theodore Appleby. On January 21, 1977, an article appearing in the *New York Daily News* reported the comments made by Lennox Hinds at that press conference as follows:

> ". . . Lenox [sic] Hinds, an attorney also representing Mrs. Chesimard, said the defense team wanted the case moved to another court because in New Brunswick *'what we are seeing is legalized lynching.'*
>
> "He [Hinds] said he was speaking for the defense team because its members were 'gagged' by Judge Appleby whom he [Hinds] accused of asking prospective jurors self-serving questions which he [Hinds] said were leading to 'the creation of a hangman's court.'" (Emphasis added) (J.A.66) (P.Ex. 2).*

An article which appeared in the *Newark Star-Ledger*, on the same date, reported that Lennox Hinds had "called the state proceeding 'a travesty'" and that he "charged that Superior Court Judge Theodore Appleby 'does not have the judicial temperament or the racial sensitivity to sit as an impartial judge in the Chesimard trial'" (J.A.67 to J.A.70) (P.Ex. 3).

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* The following abbreviations will be used hereinafter: "J.A."—Joint Appendix; "P.Ex."—Plaintiffs' Exhibit; "Pet. App."—Appendix to the Petition for Writ of Certiorari; and "P.B. App."—Appendix to Petitioner's Brief.

These newspaper articles were brought to the attention of the Middlesex County Ethics Committee by Robert M. Foley, a member of the committee. Thereafter, at its February meeting, the committee directed Mr. Foley to investigate the matter for possible violations of the New Jersey Disciplinary Rules by Mr. Hinds.* Accordingly,

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* In New Jersey, attorney disciplinary jurisdiction is reposed solely in the Supreme Court of New Jersey pursuant to the State Constitution. *N.J. Const.* (1947), Art. VI, §2, ¶3. The Supreme Court has established the District Ethics Committees and the Disciplinary Review Board to assist it in the administration of its disciplinary function. N.J. Ct. R. 1:20-1. Disciplinary proceedings are commenced by the filing of a complaint with a District Ethics Committee, either by an aggrieved individual or by a member of the committee. N.J. Ct. R. 1:20-2(e), (h), (l) (i) and (k). The attorney complained against must file an answer to the complaint within ten days after service of the complaint. N.J. Ct. R. 1:20-2(j). Thereafter, the matter proceeds to hearing before the district ethics committee except that the investigating committee member is not permitted to participate as a member of the hearing panel but may serve as the Presenter of the charges. See N.J. Ct. R. 1:20-2(k), (e), (l)(i) and (m). Dispositions available from the District Ethics Committees and the Disciplinary Review Board are limited by Court Rule. See N.J. Ct. R. 1:20-2(o). However, any discipline beyond that of private reprimand must be reviewed by the Supreme Court of New Jersey. N.J. Ct. R. 1:20-4 (a).

At the time the *Hinds* matter arose, an ethics committee was established in each of the 21 counties in New Jersey. The Middlesex County Ethics Committee had jurisdiction to investigate the *Hinds* matter since both the Chesimard trial and Mr. Hinds' law office were located in the City of New Brunswick in Middlesex County. Following the revision of the New Jersey Court Rule governing attorney disciplinary proceedings, the 21 county ethics committees were consolidated into 12 district ethics committees, each corresponding to the vicinage of the 12 assignment judges of the Superior Court of New Jersey. The Middlesex County Ethics Committee is now the District VIII Ethics Committee which encompasses Middlesex County.

Mr. Foley wrote to Mr. Hinds on February 24, 1977 informing Mr. Hinds that he had been assigned to investigate the circumstances surrounding the January 20, 1977 press conference and was seeking a conference with Mr. Hinds at a convenient date and place to discuss the matter (J.A.71 to J.A.72) (P.Ex.4). Mr. Hinds refused to cooperate with the investigation. He did, however, publicly release the initial communication from Mr. Foley which was generally reported in the local press. The investigation was thereafter stayed pending completion of the Chesimard trial to avoid additional publicity which might adversely affect that trial (J.A.83 to J.A.84) (P.Ex.9).

Upon completion of the Chesimard trial a further sixty-day stay of the investigation was sought on behalf of Mr. Hinds and granted (J.A.84) (P.Ex.9). The investigation was not reactivated until May, 1977. Following further unsuccessful attempts to interview Mr. Hinds concerning the statements attributed to him in the newspaper articles and his relationship to, and connection with, the Chesimard defense team, the investigation was conducted without his cooperation. As part of his investigation, Mr. Foley interviewed reporters from the *Newark Star-Ledger* and the *New York Daily News,* both of whom stated that their articles were accurate and that they would "stand behind" them (J.A.75) (P.Ex.5). Mr. Foley also contacted the New Jersey Public Broadcasting Authority which had covered the January 20, 1977 press conference. The Authority provided Mr. Foley with a tape recording of the press conference which contained the following comments:

> "Mr. Hinds: 'We feel that it is a kangaroo—it will be a kangaroo court unless the judge recluses [sic] himself and that will be at the very minimum.'

"Reporter: 'And a kangaroo court means a guilty verdict.'

"Mr. Hinds: 'That's correct.'" (J.A.75) (P.Ex. 5).

Upon completion of the investigation, Mr. Foley submitted a report to the committee in which he concluded that the public statements made by Mr. Hinds were prejudicial to the administration of justice and, as such, violative of DR1-102(A)(5). He further found that these statements, made by an attorney allegedly speaking for the defense team during the jury selection process in the Chesimard criminal trial, were "reasonably likely to interfere with a fair trial in that the statements were designed to influence the thinking of prospective jurors." He, therefore, concluded that these statements also violated DR7-107(D). Based upon these findings, Mr. Foley recommended that a statement of charges be prepared and served upon Mr. Hinds in accordance with N.J. Ct.R. 1:20-2(b) (J.A.73 to J.A.77) (P.Ex.5).

The Middlesex County Ethics Committee accepted the Foley report and charges were served upon Lennox Hinds on January 3, 1978 (J.A.20 to J.A.21). Pursuant to N.J. Ct. R. 1:20-4(c), Mr. Hinds had ten days from the date of service in which to file an answer with the committee. In response to Mr. Hinds' requests, the time to answer was twice extended, the second extended date for filing being March 10, 1978.

Mr. Hinds never did submit an answer to these charges. Instead, a complaint was filed in United States District Court on February 10, 1978 by Mr. Hinds and three or-

ganizations essentially composed of minority attorneys.* The complaint sought to enjoin the disciplinary proceeding pending before the Middlesex County Ethics Committee and to obtain a judgment declaring DR1-102(A)(5) and DR7-107(D) unconstitutional. Since plaintiffs were challenging disciplinary rules adopted by the Supreme Court of New Jersey, they alleged that they had no realistic remedy within the legal machinery of the State of New Jersey and that "it would be a futile gesture to request the Ethics Committee, which was created by the said Court, *or the said Court itself, to declare its own pronouncement to be unconstitutional*" (Emphasis added) (J.A.26).

Plaintiffs thereafter moved for a preliminary injunction and declaratory relief while defendant moved for dismissal of the complaint or summary judgment. On June 6, 1978, the district court granted defendant's motion to dismiss the complaint under the abstention doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971), finding the "principles of comity and federalism dictate that the federal court abstain so that the state is afforded the opportunity to interpret its rules in the face of a constitutional challenge." (Pet.App. at 53a to 54a). In so concluding, the

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* According to the complaint, these organizations are dedicated to identifying and eradicating racism in America, particularly in its legal and judicial system (J.A.17 to J.A.18). It was also alleged that the mere filing of the complaint by the ethics committee had chilled these attorneys from making such expression as would be necessary to advance "the public's knowledge of the existence of racism within the legal processes of the State of New Jersey" (J.A.23). Of course, the confidentiality of New Jersey attorney disciplinary proceedings would normally have protected against such chilling effect which, if it did occur, resulted from Lennox Hinds' breach of the confidentiality of the process when he read, at a press conference, the initial communication from the Middlesex County Ethics Committee.

court rejected plaintiffs' arguments that the ethics committee and the Supreme Court of New Jersey were biased tribunals incapable of affording Mr. Hinds a fair and impartial forum in which to challenge the constitutionality of the New Jersey Disciplinary Rules (Pet. App. at 47a to 51a).

Plaintiffs moved, pursuant to R.59(e) F.R.C.P., to alter or amend the judgment of the court (J.A.57). The district court reopened the case for the limited purpose of permitting plaintiffs to demonstrate, through evidentiary hearing, the degree of bad faith and harassment necessary to operate as an exception to the *Younger* abstention doctrine. (Pet. App. at 56a). Extensive discovery was undertaken and two days of hearings were held before the Honorable Clarkson S. Fisher.

On December 13, 1979, the trial judge filed a letter opinion in which he found:

> ". . . that plaintiffs have failed to meet their burden of proof and that the Middlesex County Ethics Committee did not act in bad faith or in any way harass Hinds, *but sought only to fulfill its function as agent of the New Jersey Supreme Court* and guardian against infractions of the disciplinary rules.
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> • • •
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> ". . . I am satisfied that Hinds will have a full and fair opportunity to address all charges that may be brought against him through the state process.
>
> "There has been no evidence deduced to justify an exception to the *Younger* abstention doctrine." (Emphasis added) (Pet. App. at 57a to 58a).

Plaintiffs appealed this decision and pursuant to R.62(c) F.R.C.P., moved before the trial court for a stay pending

appeal.* This relief was granted and an order was entered on April 14, 1980 staying all proceedings by the ethics committee pending the disposition of the appeal before the Third Circuit (J.A.214).

The United States Court of Appeals for the Third Circuit, in its majority opinion, concluded that the district court had abused its discretion when it denied plaintiffs injunctive relief on the basis that the doctrine of *Younger* v. *Harris* required abstention. The court of appeals recognized that "disciplinary proceedings directed against members of the bar are primarily the concern of the state courts" (Pet. App. at 21a). Nevertheless, it concluded that the predicate for *Younger* abstention—"the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved"—was lacking in the pending State disciplinary proceeding (Pet. App. at 21a).

The Middlesex County Ethics Committee filed a petition for a rehearing *in banc* which was supported by an affidavit of Stephen W. Townsend, the Clerk of the Supreme Court of New Jersey. Mr. Townsend stated that the Supreme Court of New Jersey had formally considered the decision of the United States Court of Appeals in this matter at its conference of March 9, 1981 (Pet. App. at 59a to 61a). At that time, it was determined to "bring the constitutional claim of Lennox Hinds, Esquire, directly before [the Supreme Court of New Jersey] . . . upon notification that its action would not violate the existing stay" (Pet. App. at 61a).

Despite the unqualified opportunity afforded Mr. Hinds for the adjudication of his constitutional claims by the Su-

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* During the pendency of this matter before the trial court, the ethics committee had voluntarily stayed its processing of the *Hinds* disciplinary matter.

preme Court of New Jersey, the United States Court of Appeals declined to rehear this matter* (Pet. App. at 31a to 40a). It refused to vacate its judgment on the basis of the New Jersey Supreme Court action and thereby deprive its judgment of its "precedential value" (Pet. App. at 35a). Indeed the court of appeals was not persuaded that "Hinds could have obtained New Jersey Supreme Court consideration of his constitutional claim when he instituted the federal action . . ." (Pet. App. at 37a).

The court of appeals stated, however, in its opinion sur petition for rehearing, that it did not intend that the "New Jersey proceedings should be stayed pending the federal proceedings" (Pet. App. at 36a). The Supreme Court of New Jersey, therefore, issued an Order on Certification on June 8, 1981, certifying the entire Hinds matter, including the constitutional challenges to DR1-102 (A)(5) and DR7-107(D), to itself for consideration (Pet. App. at 62a). Thereafter, on November 10, 1981, following the submissions of briefs from the parties addressing the question of whether further factual findings would be necessary to the adjudication by the Supreme Court of New Jersey of the constitutionality of DR1-102 and DR7-102(D), both on their face and as applied to Mr. Hinds, the New Jersey Supreme Court issued an order setting a briefing schedule for the constitutional challenges to the

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* Four of the seven judges who participated in considering the petition would have granted rehearing. The petition was denied, however, (1) since neither of the two judges who concurred in the original majority opinion asked for rehearing and (2) since a majority of the current judges in regular active service did not vote for rehearing *in banc*. With regard to the latter reason, the opinion indicated that two judges of the circuit court did not participate but failed to disclose the reason for their nonparticipation (Pet. App. at 31a).

aforementioned attorney disciplinary rules (P.B. App. at 1). Furthermore, in accordance with the judgment of the United States Court of Appeals, the constitutionality of these disciplinary rules adopted by the Supreme Court of New Jersey is also presently pending before the district court (Pet. App. at 44a). By order filed June 22, 1981, the Honorable Clarkson S. Fisher vacated his prior order of January 14, 1980 and restored jurisdiction in the district court over this matter (P.B. App. at 2).

The Petition for Writ of Certiorari was filed in this matter by the Middlesex County Ethics Committee on September 5, 1981. Certiorari was granted on November 2, 1981.

Summary of Argument

The abstention doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971) and its progeny generally prohibits federal courts from granting any declaratory or injunctive relief which would interfere with any pending State proceeding in which important State interests are at stake. Because the New Jersey Constitution grants the Supreme Court of New Jersey exclusive and plenary authority to license, regulate and discipline attorneys admitted to practice in the State, attorney disciplinary proceedings clearly involve the type of important State interests to which *Younger* is applicable. Thus, as a matter of comity, and absent irreparable harm or other extraordinary circumstances justifying interference, a federal court must not entertain any claims which are also pending as part of an ongoing attorney disciplinary proceeding.

Younger abstention is based on the premise that ordinarily a pending State proceeding provides an individual with a fair and sufficient opportunity to vindicate his federal constitutional rights. Thus, so long as an attorney has an opportunity to pursue and obtain a timely decision on his federal claims in the course of a disciplinary proceeding, *Younger* abstention is appropriate. As the Court indicated in *Moore* v. *Sims*, 442 U.S. 415 (1979), *Younger* abstention is appropriate unless State law clearly bars interposition of federal claims.

In the instant case, the Middlesex County Ethics Committee conducted a preliminary investigation of Mr. Hinds' conduct and filed a complaint against him. Rather than file an answer as required by the rules, Mr. Hinds instead filed suit in the district court. Although New Jersey disciplinary proceedings are conducted privately, Mr. Hinds chose to hold a press conference to publicly announce the

pendency of proceedings against him. As such, any possible harm resulting from the disciplinary proceedings was self-created. Finding no irreparable injury or extraordinary circumstances to warrant interference by the federal court in the State disciplinary proceeding, and noting that at no time did Mr. Hinds allege the lack of opportunity to present his federal claims in the disciplinary proceeding, the district court dismissed under *Younger*.

The Court of Appeals for the Third Circuit reversed, however, in keeping with its continuing effort to undermine the *Younger* doctrine. See *New Jersey-Philadelphia Presbytery* v. *New Jersey State Board of Higher Education*, 654 F. 2d 868 (3d Cir.), reh. denied, —— F. 2d —— (3d Cir., No. 80-1253, May 27, 1981); *Phillips* v. *Pennsylvania Higher Education Assistance Agency*, 657 F. 2d 554 (3d Cir. 1981). The Third Circuit's decision is based upon the mistaken notion that Mr. Hinds lacks an opportunity to have his federal claims adjudicated in the disciplinary proceeding. Focusing narrowly on the ethics committee stage, rather than the entire disciplinary system, the Third Circuit found that the ethics committee's function is "prosecutorial" rather than "adjudicative," and therefore, that the committee is an inadequate forum to consider such claims.

In fact, New Jersey law does not bar adjudication of such claims in the course of the disciplinary proceeding. The Supreme Court of New Jersey has indicated that ethics committees are its agents serving as arms of the court to assist it in disciplinary matters. The committees were created pursuant to the court's state constitutional authority over attorneys. The supreme court has full control over disciplinary proceedings from their inception, and such proceedings are considered judicial in all respects. *In re Logan*, 70 N.J. 222, 358 A. 2d 787 (1976);

Toft v. *Ketchum*, 18 N.J. 280, 113 A. 2d 671 (1955). As such, the supreme court itself may directly entertain, and in fact has entertained, various motions during the course of disciplinary proceedings. Moreover, the supreme court has unhesitatingly undertaken direct review of its own rules for federal constitutional deficiencies. In fact during the course of the instant case, the Supreme Court of New Jersey formally codified this practice as N.J. Ct. R. 1:20-4(a)(i), and is now considering the federal issues raised by Mr. Hinds. As such, Mr. Hinds clearly has an adequate opportunity to present his claims to the Supreme Court of New Jersey, and *Younger* abstention by the district court is therefore appropriate.

The Third Circuit erroneously engaged in an isolated analysis of the ethics committee as a forum for presentation of constitutional claims, rather than recognizing the unitary nature of New Jersey's attorney disciplinary system with direct supervision and ultimate control vested in the State Supreme Court. No decision of this Court sanctions the Third Circuit's analysis, and in fact *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975) stands for the proposition that review of constitutional issues at the appellate level of a State judicial system (*e.g.* the Supreme Court of New Jersey) is sufficient "opportunity" for *Younger* purposes.

Since Mr. Hinds clearly had sufficient opportunity to have his federal claims adjudicated in the course of the disciplinary proceeding, and since those claims are in fact now pending before the Supreme Court of New Jersey for adjudication, the judgment of the Third Circuit should be reversed and the complaint dismissed under *Younger*.

ARGUMENT

When an attorney disciplinary proceeding is pending under the supervision of the Supreme Court of New Jersey, before a committee established as an agent of the Supreme Court, and the attorney has the opportunity to seek review of federal constitutional claims before the Supreme Court in the context of the disciplinary process, the *Younger* doctrine requires federal courts to abstain from interfering in such proceedings.

In its opinion below, the Court of Appeals for the Third Circuit erroneously interpreted New Jersey law and concluded that an attorney against whom a disciplinary proceeding has been initiated lacks the opportunity to raise federal constitutional issues and have them timely decided by a competent State tribunal. Based upon its clear misreading of State law, the Third Circuit improperly reversed the well reasoned decision of the district court, which had previously dismissed the complaint pursuant to the abstention doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971). At the time this case was filed in the district court, however, decisions and practices of the Supreme Court of New Jersey had established, and a previous decision of the Third Circuit had recognized, that attorneys charged with unethical conduct have the opportunity to obtain timely review of federal issues as required by *Younger*. Indeed, the federal constitutional issues raised by Mr. Hinds are currently pending for review before the Supreme Court of New Jersey. In view of the Third Circuit's obvious error in construing a sensitive area of State procedural law, the appellate court's judgment should be

reversed and the district court's dismissal reinstated in accordance with *Younger*.*

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* This case does not represent an isolated departure by the Third Circuit from the well established principle of federal non-interference in pending State matters. Rather it is but one of a series of cases which is seriously eroding the *Younger* abstention doctrine as it is applied by the Court of Appeals for the Third Circuit. *See New Jersey-Philadelphia Presbytery* v. *New Jersey State Board of Higher Education*, 654 F.2d 868 (3rd Cir.), reh. denied —— F.2d —— (3rd Cir. No. 80-1253, May 27, 1981); and *Phillips* v. *Pennsylvania Higher Education Assistance Agency*, 657 F.2d 554 (3rd. Cir., 1981). In its decision denying rehearing in the instant case, the Third Circuit indicated that the *New Jersey-Philadelphia Presbytery* holding, which creates a radical new exception to the *Younger* doctrine, should be applied to the instant case on remand to the district court. (Pet. App. 35a-36a). In *New Jersey-Philadelphia Presbytery*, the court decided that *Younger* is inapplicable to a federal lawsuit seeking to enjoin an ongoing State proceeding so long as the federal plaintiffs include at least one plaintiff who is not technically a party to the pending State proceeding. The Third Circuit thus suggests that the presence here of plaintiffs other than Mr. Hinds might, without more, be reason enough to reject *Younger* abstention even assuming an adequate opportunity for Mr. Hinds to assert his federal claims in the course of the State disciplinary proceeding.

This preposterous suggestion, clearly designed to bring about the demise of *Younger* in the Third Circuit, has no basis in law and conflicts with the Court's decision in *Hicks* v. *Miranda*, 422 U.S. 332 (1975). In *Hicks*, the owners of a theatre sought federal court adjudication of the constitutionality of a State obscenity statute under which their employees were being prosecuted in State court. In invoking *Younger* abstention, the Court noted that "[the employees'] interests and those of the employers were intertwined," that the employers had a "substantial stake in the State proceedings," and thus remitted the employers to available remedies in

(Footnote continued on following page)

This Court has consistently fostered a strong public policy against interference with State proceedings by federal courts either by way of injunction or declaratory relief. *Younger* v. *Harris, supra.* See *Samuels* v. *Mackell,* 401 U.S. 66 (1971). Two primary sources of this national policy have been identified One is the basic equitable principle that courts of equity ought not act, particularly to restrain state judicial processes, when the affected party has an adequate remedy at law and will not suffer irreparable harm by denial of the equitable relief. *Younger* v. *Harris, supra,* 401 U.S. at 43-44. The second and more vital consideration is the notion of federalism or comity, which requires:

> ". . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger, supra,* 401 U.S. at 44.

(Footnote continued from preceding page)

State court. *Id.* at 348. See *Doran* v. *Salem Inn, Inc.,* 422 U.S. 922 (1975); *Steffel* v. *Thompson,* 415 U.S. 452 (1974) (federal plaintiffs not party to ongoing State enforcement proceedings may obtain declaratory or injunctive relief so long as such relief does not interfere with ongoing State proceedings).

Thus, abstention is appropriate when the interests of a federal plaintiff, not a party to State proceedings, are intertwined with the interests of one who is a party to State proceedings. The organizational plaintiffs here lack independent standing or, at best, their claims are derivative of, and closely intertwined with, those of Mr. Hinds, such that their mere presence in this litigation does not bar *Younger* abstention. See, e.g., *American Civil Liberties Union* v. *Bozardt,* 539 F.2d 340 (4th Cir.), *cert.* denied, 429 U.S. 1022 (1976).

The central idea underlying *Younger* is the recognition that under our federal system:

> "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

As developed through such cases as *Moore* v. *Sims*, 442 U.S. 415 (1979); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Juidice* v. *Vail*, 430 U.S. 327 (1977); *Kugler* v. *Helfant*, 421 U.S. 117 (1975) and *Huffman* v. *Pursue, Ltd.*, 420 U.S 592 (1975), the *Younger* abstention doctrine holds that absent extraordinary circumstances justifying intrusion, federal courts must restrain from taking any action in cases where the federal plaintiff, in effect, asks the court to interfere with State proceedings. Although this doctrine of federal non-interference was first articulated with reference to State criminal proceedings, it is now recognized as being ". . . fully applicable to civil proceedings in which important State interests are involved". *Moore* v. *Sims, supra*, 442 U.S. at 423. See *Geiger* v. *Jenkins*, 401 U.S. 985 (1971), affirming 316 F.Supp. 370 (N.D. Ga. 1970); *Williams* v. *Red Bank Bd. of Education*, —— F.2d —— (3rd Cir., No. 81-1275, decided October 26, 1981).

It is difficult to imagine an area of State interest more important than that of the ability of a State's judiciary to regulate and discipline those persons licensed to appear before it as attorneys. In recognition of the fundamental State interest in unimpaired performance of these responsibilities, the lower federal courts have consistently followed the *Younger* abstention doctrine and have refrained from interfering with pending State attorney dis-

ciplinary proceedings. *Gipson* v. *New Jersey Supreme Court,* 558 F.2d 701 (3rd Cir. 1977); *Rosenthal* v. *Carr,* 614 F.2d 1219 (9th Cir.), *cert.* denied, 447 U.S. 927 (1980); *American Civil Liberties Union* v. *Bozardt,* 539 F.2d 340 (4th Cir.), *cert.* denied, 429 U.S. 1022 (1976); *Anonymous* v. *Association of the Bar of the City of New York,* 515 F.2d 427 (2nd Cir.), *cert.* denied, 423 U.S. 863 (1975); *Anonymous* v. *Bar Association of Erie County,* 515 F.2d 435 (2nd Cir.), *cert.* denied, 423 U.S. 840 (1975); *Goodrich* v. *Supreme Court of State of South Dakota,* 511 F.2d 316 (8th Cir. 1975); *Erdmann* v. *Stevens,* 458 F.2d 1205 (2nd Cir.), *cert.* denied, 409 U.S. 889 (1972). Except for the Third Circuit decision under review, the decisions reflect total agreement among the circuits that it would be particularly disruptive to the special relationship between State courts and members of their bars for federal courts to interfere with or enjoin State bar disciplinary proceedings. This concern was clearly enunciated in *Gipson, supra,* 558 F.2d at 704:

> "The traditional power of the state courts to establish standards for members of their bars and to discipline them . . . suggests that incursions by federal courts into ongoing disciplinary proceedings would be peculiarly disruptive of notions of comity."

See also, *Tepper* v. *State Bar of Wisconsin,* 489 F.Supp. 115 (E.D. Wis. 1980), aff'd, 636 F.2d 1222 (7th Cir. 1980); *Doe* v. *State Bar of California,* 415 F.Supp. 308 (N.D. Cal. 1976), aff'd, 582 F.2d 25 (9th Cir. 1978); *Tedesco* v. *O'Sullivan,* 420 F.Supp. 194 (D. Conn. 1976); *Niles* v. *Lowe,* 407 F.Supp. 132 (D. Hawaii 1976).

In the instant case, there is no dispute that State bar disciplinary proceedings are proper subjects for the application of *Younger* abstention. The Third Circuit ex-

pressly recognized that "disciplinary proceedings directed against members of the bar are primarily the concern of the state courts" (Pet. App. at 21a). Indeed, the court reiterated its holding in *Gipson, supra,* 558 F.2d at 704, that "[i]n view of the special relationship between state courts and members of their bars, . . . the doctrine of federal non-interference is appropriate in suits concerning pending attorney disciplinary proceedings" (Pet. App. at 21a).

The decision of the Third Circuit in the present case, however, represents a radical departure from this well established tradition of non-interference with State disciplinary proceedings. In reaching its decision, the court below posits a novel basis for justifying federal intrusion into the delicate and unique relationship between a State court and the attorneys practicing before it. After reviewing the procedures established by the Supreme Court of New Jersey to govern the discipline of New Jersey attorneys, the court of appeals concluded that the pendency of a disciplinary matter before an ethics committee of the supreme court did not constitute the pendency of that matter before the supreme court itself. The court below next determined that the ethics committee would not provide Mr. Hinds with an adequate forum in which to raise his federal constitutional claims. In reaching this conclusion, the court of appeals appears to construct a procedural chasm between the ethics committee and the supreme court which cannot be breached either by way of motion to the supreme court or by order from the supreme court to the committee. The court below, therefore, found that the predicate for *Younger* abstention does not exist, to wit, "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," and that Mr. Hind's challenge to the constitutionality of the State disciplinary rules should be adjudicated instead by the federal district court.

The policy of equitable restraint expressed in *Younger* "is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler* v. *Helfant*, 421 U.S. at 124 (1975). Thus, so long as the "opportunity" to fairly pursue constitutional claims is present in a State proceeding, *Younger* abstention is appropriate. *Juidice* v. *Vail*, 430 U.S. at 337 (1977). Failure of an individual to avail himself of such "opportunity" does not mean a State procedure is inadequate. *Id.* Thus, the "opportunity" to pursue a claim need not contemplate or include a guarantee that the result desired by an individual will be obtained. Rather, the "opportunity" only means that there exists a forum which has the ability to impartially consider a claim and the power to grant relief if appropriate. *Huffman* v. *Pursue, Ltd.*, 420 U.S. at 608-609; *Trainor* v. *Hernandez*, 431 U.S. at 469 n. 15 (Stevens, J., dissenting).

Most recently, the Court had occasion to consider the "opportunity" component in *Moore* v. *Sims*, 442 U.S. 415 (1979), and indicated that State law should be examined to determine whether a federal constitutional challenge can be raised in a pending State proceeding. The Court noted that "Certainly abstention is appropriate unless state law clearly bars the interposition of the constitutional claims." 442 U.S. at 425-426. In *Moore*, the Court decided in favor of abstention because no bar was discovered to preclude consideration of such claims before the State forum:

> "In sum, the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims, and Texas law appears to raise no procedural barriers." 442 U.S. at 430.

Furthermore, the federal plaintiffs have the burden of demonstrating that State law proscribes the opportunity to present federal claims. In *Moore,* the Court upheld *Younger* abstention because "the appellees have not shown that State procedural law barred presentation of their claims—in fact Texas law seems clearly to the contrary." 442 U.S. at 432.

In the instant case, neither the Third Circuit nor Mr. Hinds identified any procedural barrier under New Jersey law which would operate to preclude the interposition of his constitutional claims. In fact, the district court observed that:

> "The plaintiffs have not alleged that Hinds will not be afforded an opportunity to present his constitutional claims in the disciplinary proceedings." (Pet. App. at 50a).

Decisions of the New Jersey Supreme Court clearly indicate the existence of an adequate opportunity to raise constitutional challenges in the context of attorney disciplinary proceedings.

By express provision of the New Jersey Constitution, the Supreme Court of New Jersey has been vested with complete jurisdiction over admission to the practice of law and the discipline of persons so admitted. *N.J. Const.,* Art., VI, §2, ¶3. In order to assist in the discharge of this function, the supreme court established, by court rule, district ethics committees. See N.J. Ct. R. 1:20-2.

> *"These committees are agents of the Supreme Court.* It is the Supreme Court which in the final analysis makes the factual findings, draws the legal conclusions and determines the appropriate discipline." *In re Logan,* 70 N.J. 222, 225, 358 A.2d 787, 789 (1976) (Emphasis added).

Indeed, the nature of the relationship between the ethics committees and the supreme court was articulated by *Toft* v. *Ketchum,* 18 N.J. 280, 284, 113 A.2d 671, 673-674 (1955):

> ". . . the filing of a complaint with one of our ethics and grievance committees is in effect a filing with the Supreme Court, in which alone the power to discipline attorneys-at-law in New Jersey resides . . . The several county ethics and grievance committees established under our rules of court . . . are arms of the court which perform the very important functions of receiving complaints, investigating them, holding hearings on them, and then presenting their findings to the court. *The Supreme Court, however, has at all times full control over the proceedings . . . From the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee*" (Emphasis added).

Clearly, the Supreme Court of New Jersey exercises exclusive and plenary authority over the attorney disciplinary system it has devised pursuant to its mandate under the New Jersey Constitution. As such, the supreme court maintains "full control" over each stage of the proceedings regardless of whether the matter is before the District Ethics Committee or the Disciplinary Review Board (N.J. Ct. R. 1:20-3). As specified in *Toft,* the supreme court considers a complaint filed with an ethics committee as "in effect a filing with the Supreme Court," since the committees are "agents" of the supreme court, and disciplinary proceedings are "judicial" in nature "from the very beginning."

Not unsurprisingly then, the supreme court's control over its ethics committees includes the power to entertain

constitutional or other issues by way of motion at any time during the course of a disciplinary proceeding. *In re Logan, supra,* plainly reveals the existence and adequacy of this opportunity. In that case, the respondent attorney complained "that motions in the cause had to be presented to the Supreme Court and this constituted a denial of due process." 70 N.J. at 229, 358 A.2d at 791. The supreme court pointed out, however, that the entire disciplinary

> "proceeding is one in this Court. No restraint was imposed on the respondent in this respect and he made several motions, all of which were ruled on by the Court." *Id.*

In light of *Logan,* the Third Circuit obviously erred in concluding that no opportunity for competent review of the constitutionality of disciplinary rules exists within the the context of attorney disciplinary proceedings in New Jersey. Indeed, where challenges to the validity of its rules have arisen, the Supreme Court of New Jersey has unhesitatingly undertaken an examination of the challenged policies. See *In the Matter of the Application of Philip J. LiVolsi,* 85 N.J. 576, 428 A.2d 1268 (1981) (review of constitutionality and desirability of Fee Arbitration Committees, N.J. Ct. R. 1:20A-1 *et seq.,* requiring arbitration of attorney fee disputes upon a client's request (whether the lawyer consents or not) or upon a lawyer's request if the client consents; constitutionality of procedures upheld; need for amendment of rules to provide for limited right of appeal acknowledged); *American Trial Lawyers* v. *N.J. Supreme Court,* 66 N.J. 258, 330 A.2d 350 (1974) (constitutionality of rule establishing graduated schedule of maximum contingent fees for tort litigation upheld); *In re NBC,* 64 N.J. 476, 317 A.2d 695 (1974) (Canon of Judicial Ethics barring courtroom sketching during court sessions or recesses modified). As the supreme court has recognized:

> "Our rules are never immutable. Applications for their review are never foreclosed [for] . . . [t]he Court does not adopt its rules to promote or brook injustice but, as best it can, to secure justice . . ." *American Trial Lawyers* v. *N.J. Supreme Court, supra,* 66 N.J. at 267, 330 A.2d at 355.

Following the decision of the Third Circuit, the supreme court formalized by rulemaking its practice whereby constitutional issues may be raised within the context of disciplinary proceedings. N.J. Ct. R. 1:20-2(j), which became effective on September 14, 1981, requires that constitutional challenges to disciplinary proceedings are to be set forth in the answer to the complaint. All constitutional challenges, whether raised before the District Ethics Committee or before the Disciplinary Review Board, are to "be withheld for consideration by the Supreme Court as part of its review of the final decision of the Disciplinary Review Board." Most importantly, however, N.J. Ct. R. 1:20-4(a)(i) now specifically memorializes the procedure by which constitutional issues may be lodged directly with the supreme court:

> "An aggrieved party may file a motion for leave to appeal with the Supreme Court to seek interlocutory review of a constitutional challenge to proceedings pending before the District Ethics Committee or the Disciplinary Review Board. The motion papers shall conform to R. 2:8-1. Leave to appeal may be granted only when necessary to prevent irreparable injury. If leave to appeal is granted, the record below may, in the discretion of the Court, be supplemented by the filing of briefs and oral argument."

The abovequoted rule eliminates all doubt that no bar exists to timely review of constitutional issues in the

course of disciplinary proceedings. In fact, on June 3, 1981, the supreme court certified Mr. Hinds' constitutional issues for direct consideration by the court. That matter is currently pending before the court. Under these circumstances, the appropriateness of *Younger* abstention can hardly be denied.

Even prior to the adoption of N.J. Ct. R. 1:20-4(a)(i) and the direct certification of Mr. Hinds' challenge by the Supreme Court of New Jersey, the "opportunity" predicate for *Younger* abstention plainly existed. Once the ethics committee filed its formal statement of charges, Mr. Hinds was obligated to submit an answer under N.J. Ct. R. 1:20-4(c) and 1:20-2(j). In the answer, he could have challenged the constitutionality of the disciplinary rules under which he was charged. Moreover, pursuant to *Logan,* he could have sought direct adjudication of his claims by motion to the Supreme Court of New Jersey. Mr. Hinds, however, neither filed an answer nor sought review by motion to the supreme court. Rather than take advantage of these opportunities to raise his constitutional claims in the State proceedings, the plaintiffs filed suit in federal district court. Indeed, the present case presents the converse of the predicate for *Younger* abstention. By tenaciously resisting the opportunities to raise his federal claim in the State proceedings, Mr. Hinds sought to divest the State court of the ability to adjudicate those claims. Since, however, the Supreme Court of New Jersey always provided an adequate opportunity for adjudication of such claims, *Younger* and its progeny require that the State court be allowed to proceed without interference. For

> ". . . to restrain a state proceeding that afforded an adequate vehicle for vindicating the federal plaintiff's constitutional rights 'would entail an un-

> seemly failure to give effect to the principle that state courts have the solemn responsibility equally with the federal courts to safeguard constitutional rights and would 'reflec[t] negatively upon the state court's ability' to do so. *Steffel* v. *Thompson*, 415 U.S. 452, 460-461, 462 (1974). The State would be prevented not only from 'effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies.' *Huffman* v. *Pursue Ltd.*, 420 U.S. at 604." *Trainor* v. *Hernandez, supra*, 431 U.S. at 442.

The Third Circuit's decision below was also based upon the erroneous premise that a disciplinary matter pending before an ethics committee of the Supreme Court of New Jersey is not a pending proceeding which is entitled to deference under *Younger*. The Third Circuit arrived at this conclusion by isolating the ethics committee stage of the proceeding and considering it in a vacuum apart from the disciplinary process as a whole. Thus, the court stated that:

> "it is immediately apparent 'that the powers and procedures of the District Ethics Committee stand in sharp contrast to those of the State judicial bodies to which the federal courts have abstained" (Pet. App. 12a)

which completely ignores the fact that under New Jersey law the committee is an agent of and functions under the supervision of the highest judicial body in the state, the Supreme Court of New Jersey. Moreover, the Third Circuit determined that *Younger* was inapplicable because of its

belief that a proceeding before the ethics committee had not yet reached an "adjudicative" stage, but was merely at a "preindictment" or "investigative" stage at the time the federal complaint was filed. The court recognized, however, that its analysis regarding "the stage of the state proceedings at which abstention should be applied" was a novel approach because the issue has "not yet been fully developed in Supreme Court bases". (Pet App. 16a).

Clearly, the Third Circuit had no basis for narrowly focusing its analysis upon an isolated consideration of the ethics committee stage of New Jersey's disciplinary procedure, and then concluding in a vacuum that that stage alone was not an adjudicative proceeding entitled to deference under *Younger*. Rather, the court should have focused upon the entire process adopted by, and operated under the supervision of, the New Jersey Supreme Court within which there clearly exists an adequate opportunity for review of constitutional issues.

No decision of this Court has ever required that a State proceeding be dissected by a federal court into adjudicative and nonadjudicative segments, or held that *Younger* applies only to the former. Indeed, such action by a federal court constitutes precisely the type of interference into state affairs which *Younger* is designed to prevent. On the contrary, the Court has indicated that once a State proceeding is commenced, the main focus for *Younger* purposes is upon the issue of whether the opportunity to present federal claims is available during the course of the proceedings without regard to the "stage" at which it occurs.

Such an approach was utilized by the Court in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), which determined that *Younger* abstention applies to "state proceedings which

have already commenced" as distinguished from "those which are merely incipient or threatened." 420 U.S. at 607. The plaintiff in *Huffman* argued against *Younger* abstention on the basis that the State trial court proceeding had been concluded and final judgment entered, and that therefore there was no pending proceeding which could be interfered with. The Court, in response, took a unitary view of the State judicial system, rather than analyze each stage of the system separately:

> "We believe that a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court. . . ." 420 U.S. at 608.

Elaborating on the requirement that the "opportunity" component of *Younger* includes exhausting available avenues within the State appellate courts, the Court recognized that:

> "It is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. Especially is this true when, as here, the constitutional issue involves a statute which is capable of judicial narrowing." *Id.* at 609.

Thus, *Huffman* upheld the applicability of *Younger* abstention because at the time the federal lawsuit was filed, the federal plaintiff still had an opportunity to obtain review of his constitutional claims within the State judicial system (by appeal to the State appellate court) even though the proceeding at the trial level had terminated. *Huffman* therefore teaches that, as the predicate for *Younger* abstention, it is not required that an opportunity for review of federal claims be available before the same forum which is initially taking action. Rather, so long as

timely and adequate opportunity for review is available somewhere within the State judicial system as a whole, *Younger* is applicable.

Here, the case against Mr. Hinds was beyond the "merely incipient or threatened" stage because initial investigation had been completed, a statement of charges had been filed and served under N.J. Ct. R. 1:20-2(b), and an answer was required within ten days. N.J. Ct. R. 1:20-4(c). Clearly, the State disciplinary proceedings against Mr. Hinds had formally commenced at the time the federal complaint was filed. Whether or not the proceedings then pending before the ethics committee be characterized as "adjudicative" or "prosecutorial" is immaterial. Rather, the crucial point is that by virtue of the charges then pending against him, Mr. Hinds was a party to a disciplinary proceeding which, under *Toft* and *Logan, supra,* is deemed judicial in nature and is at all times under the direct control of the Supreme Court of New Jersey. As such, and as recently confirmed by the formal adoption of N.J. Ct. R. 1:20-4(a)(i), Mr. Hinds at that point had the opportunity to present his federal constitutional claims to the supreme court for adjudication. The predicate for *Younger* abstention is thereby satisfied.

It is glaringly apparent that the Third Circuit's decision below directly contradicts its earlier decision in *Gipson* v. *New Jersey Supreme Court,* 558 F.2d 701 (3rd Cir. 1977), a case which illustrates a correct application of the *Younger* principles enunciated by this Court. In that case, the Union County Ethics Committee issued a complaint charging Gipson with failure to properly deal with and account for clients' funds and, pursuant to its investigatory powers, issued a subpoena duces tecum requiring the production of certain records. Gipson failed to comply with this subpoena and, consequently, the Su-

preme Court of New Jersey temporarily suspended his license to practice law until compliance was made. Gipson filed suit in federal district court alleging federal constitutional infirmities underlying the disciplinary proceeding and launching a broadside constitutional attack on the New Jersey system of attorney discipline. In order to avoid the application of the *Younger* doctrine, Gipson argued that the only State proceeding with which the federal action might possibly interfere was the temporary suspension by the New Jersey Supreme Court which had already been adjudicated and was, therefore, no longer pending. The Third Circuit unequivocally rejected that argument, finding that the proceeding before the ethics committee was still pending:

> "Since the *primary disciplinary matter* clearly is still pending [before the Union County Ethics Committee], it would appear that the total relief which Mr. Gipson has requested [in federal court] would indeed *constitute an encroachment upon an ongoing state proceeding.*" 558 F.2d at 704 (emphasis added).

Clearly, the *Gipson* court recognized precisely what the panel below has ignored: that the pending proceeding before the ethics committee was one to which deference was appropriate under *Younger*. In the instant case, the panel below noted that "It is evident that the Supreme Court of New Jersey proceeding afforded Gipson ample opportunity for adjudication of his constitutional claim . . ." (Pet. App. at 15a). Clearly, Mr. Hinds at all times had available the same opportunity as Gipson to present his constitutional claims.

Furthermore, the decision in *Gipson* serves to underscore the unitary nature of the New Jersey's disciplinary

proceedings. During the pendency of the *Gipson* matter before the Union County Ethics Committee, the Supreme Court of New Jersey entertained and decided various procedural motions relative to that proceeding. It is absolutely clear from the *Gipson* history that the federal litigant, as well as the court below, understood that complete control and supervision of such matters resides in the Supreme Court of New Jersey and that applications for various forms of relief may be made to the court within the context of the disciplinary matter. This assessment of the rules governing attorney discipline is in harmony with the construction afforded its rules by the Supreme Court of New Jersey.

Not only does the decision below conflict with *Gipson*, but it is inconsistent with the holdings of other federal courts which, properly applying the *Younger* principles announced by this Court, have abstained in deference to disciplinary proceedings pending before an agency of the State judiciary. See, e.g., *Anonymous* v. *Association of the Bar of the City of New York*, 515 F.2d 427 (2nd Cir.), *cert.* denied, 423 U.S. 863 (1975); *American Civil Liberties Union* v. *Bozardt*, 539 F.2d 340 (4th Cir.), *cert.* denied, 429 U.S. 1022 (1976); *Tepper* v. *State Bar of Wisconsin*, 489 F.Supp. 115 (E.D. Wis.), aff'd, 636 F.2d 1222 (7th Cir. 1980); *Goodrich* v. *Supreme Court of State of South Dakota*, 511 F.2d 316 (8th Cir. 1975); *Rosenthal* v. *Carr*, 614 F.2d 1219 (9th Cir.), *cert.* denied, 447 U.S. 927 (1980); *Doe* v. *State Bar of California*, 415 F.Supp. 308 (N.D. Cal. 1976), aff'd, 582 F.2d 25 (9th Cir. 1978); *Seraphim* v. *Judicial Conduct Panel*, 483 F.Supp. 295 (E.D. Wis. 1980); *Niles* v. *Lowe*, 407 F.Supp. 132 (D. Haw. 1976). All of these courts applied the *Younger* abstention doctrine to disciplinary matters pending before various disciplinary committees of the State courts or of the State bar. It is only the Third Circuit, in its decision below, which has

concluded that the pendency of a disciplinary matter before an ethics committee of a supreme court does not constitute a pending State action for purposes of *Younger* abstention.

By reversing the district court's application of *Younger* to the instant case, the Third Circuit has brought about the very evils which *Younger* was designed to alleviate: duplicative legal proceedings, disruption of New Jersey's system for disciplining attorneys, and, most importantly, a negative reflection on the New Jersey Supreme Court's ability to safeguard constitutional rights in the conduct of the disciplinary program mandated by the New Jersey Constitution. *Trainor* v. *Hernandez, supra,* 431 U.S. at 443-445; *Steffel* v. *Thompson, supra,* 415 U.S. at 460-462. The Court normally presumes, absent a demonstration of "extraordinary circumstances" or "irreparable harm," that an accused will have a fair and sufficient opportunity for vindication of federal rights in the course of a State proceeding. *Kugler* v. *Helfant,* 421 U.S. at 124. The mere "cost, anxiety, and inconvenience" of having to assert such claims in a State forum by way of defense does not constitute such "extraordinary circumstances" or "irreparable harm." *Id.* Mr. Hinds has at no time demonstrated that he will be irreparably harmed if he is required to assert his federal claims before the Supreme Court of New Jersey. In fact, the only possible harm resulting from institution of disciplinary proceedings against Mr. Hinds was self-created. Although New Jersey disciplinary proceedings are normally carried out on a private, confidential basis, it was Mr. Hinds himself who publicized the initial communication received by him from the ethics committee by distributing it to the news media. Moreover, Mr. Hinds' claim that the State court is a biased forum was properly rejected, after evidentiary hearing, by the district court.

In sum, in its zeal to avoid invocation of *Younger* here, the Third Circuit has plainly misunderstood the nature of New Jersey's system of attorney discipline. The court's conclusion that Mr. Hinds lacks the opportunity to present his federal claims to the Supreme Court of New Jersey was erroneous as of the time when the federal complaint was filed, and is erroneous now because those claims are presently pending before the state supreme court for disposition. Of crucial importance is the Third Circuit's unwarranted intrusion into a particularly sensitive area of State concern. As was recognized by the United States Court of Appeals for the Second Circuit:

> "Today more than ever, the integrity of the bar is of public concern and the state which licenses those who practice in its courts, and which is the only body that can impose sanctions upon those admitted to practice in its courts, should not be deterred or diverted from the venture by the interloping of a federal court." *Anonymous* v. *Association of the Bar of the City of New York, supra,* 515 F.2d at 432.

Accordingly, the judgment of the Third Circuit should be reversed with direction to remand the matter to the district court for dismissal of the complaint.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit should be reversed and this matter should be remanded with directions to dismiss the complaint pursuant to the *Younger* abstention doctrine.

Respectfully submitted,

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Dated: December 16, 1981.

APPENDIX

Order

SUPREME COURT OF NEW JERSEY
D-61 September Term 1980

(Filed—November 10, 1981)

IN THE MATTER OF
LENNOX S. HINDS,
An Attorney at Law.

This matter having come before the Court on the order of June 3, 1981 certifying the complaint against LENNOX S. HINDS to this Court, and the Court having considered the filings by the parties discussing the need for further factual findings, and good cause appearing; it is

ORDERED that counsel for the respondent LENNOX S. HINDS serve and file within 21 days of the filing date of this order an original and eight copies of a brief on the respondent's constitutional challenges to *DR.* 1-102 and *DR.* 7-107(D); and it is further

ORDERED that counsel for complainant District VIII Ethics Committee serve and file a responding brief within 21 days thereafter, and it is further

Order

ORDERED that counsel for respondent may serve and file a reply brief within 10 days thereafter.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of November, 1981.

STEPHEN W. TOWNSEND
Clerk

Order on Mandate

(Filed—June 22, 1981)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Honorable Clarkson S. Fisher

Civil Action No. 78-273

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,

Plaintiffs,

v.

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,

Defendant.

Plaintiffs, Garden State Bar Association, The New Jersey Association of Black Women Lawyers, National Conference of Black Lawyers, and Lennox Hinds, having appealed to the United States Court of Appeals from an Order of this Court dated January 14, 1980, dismissing

the Complaint herein, and the Court of Appeals having issued its mandate filed May 21, 1981, vacating the foregoing Order of this Court and remanding the case for further proceedings,

Now upon the mandate of the United States Court of Appeals for the Third Circuit filed the 21st day of May, 1981,

It is ORDERED, ADJUDGED and DECREED that the Order of this Court dated January 14, 1980, be and the same is hereby vacated and the case shall proceed in accordance with the mandate of the United States Court of Appeals.

CLARKSON S. FISHER
U.S.D.J.

Dated: June 22nd, 1981.

Respondent's Brief

NO. 81-460

Supreme Court, U.S.
FILED
JAN 22 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,
Petitioner,

vs.

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,
Respondents.

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Counter-Statement of Questions Presented

1. Is not *Younger* abstention appropriate only in deference to state *adjudicative* proceedings?

2. Is it not essential, if a state proceeding is to be deemed an adequate predicate for *Younger* abstention, that the state forum in which the said proceeding is advancing have power fully to adjudicate all federal constitutional issues or at least that such issues can be raised to a body with such adjudicative power by interlocutory appeal as of right?

3. Would a ruling that abstention is appropriate with respect to an individual respondent compel a ruling that abstention is appropriate with respect to organizational respondents where it does not appear in the record that they have any institutional connection to the individual respondent?

4. Is it not appropriate to dismiss the petition for writ of certiorari as improvidently granted where it appears that after the grant of said petition there has been a substantial change in the posture of the case?

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United Air Lines v. Division of Industrial Safety of California, 50 U.S.L.W. 3298 27

United States v. American Railway Express Co., 265 U.S. 425 (1923) 46

Wells Fargo Co. v. Taylor, 254 U.S. 175 (1920) 25, 28

Williams v. Georgia, 349 U.S. 375 (1955) 36

Wilson v. Southern R. Co., 263 U.S. 574 (1924) 36

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28 U.S.C. §1343 22

42 U.S.C. §1971 22

42 U.S.C. §1981 22

42 U.S.C. §1982 22

42 U.S.C. §1983 .....16, 22, 26

42 U.S.C. §1985 22

Rules Cited

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DR 1-102(A)(5) 4, 8

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DR 7-107(D) 4, 10

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Other Authorities Cited

Newark Star-Ledger, "New Jersey 30th Annual Judicial Conference Reports and Transcripts", 1978 at p. 36 42

"Report of the Committee of the Judicial Conference of the United States on the Operation of the Jury System on the Free Press/Fair Trial Issue," 45 F.R.D. 391 (1968) 19

"Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the Free Press/Fair Trial Issue", 87 F.R.D. 519 (1980) 12

NO. 81-460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,

Petitioner,

vs.

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,

Respondents.

BRIEF FOR RESPONDENTS

Statement of the Case

Lennox S. Hinds is a member of the New Jersey bar, having been admitted in 1973 (194a).[1] For five years, until August 30, 1978, he was employed as National Director of the National Conference of Black Lawyers (NCBL) (*ibid.*).[2] The Conference is an organization of black lawyers having as "one of its primary purposes and missions . . . to seek out and eradicate racism throughout the United States" and to encourage black law students to practice law and defend poor and oppressed minority groups. Hinds's duties as director included monitoring judicial proceedings and speaking at press conferences and public assemblies with respect to the program of his organization, and in some instances acting as counsel for individuals in their attempts to obtain relief in the federal and state courts on charges having racial overtones (194a-196a).

Consistent with its organizational purpose, NCBL concerned itself with the prosecution and trial of Joanne Chesimard (also known as Assata Shakur), a black woman accused of killing a white police officer. The criminal proceeding against Chesimard was in the Superior Court of New Jersey, Law Division, Middlesex County. The Honorable Theodore Appleby of that court presided over the trial. Jury selection began on January 17 and ended on February 15, 1977 (79a).

Hinds was not one of the team of attorneys representing Chesimard in the criminal trial (196a). That fact was

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[1] The reference is to the joint appendix. Wherever reference is made to a different appendix, such as the appendix attached to the petition for writ of certiorari, that is specifically indicated.

[2] Hinds is presently engaged in the private practice of law in New Jersey and New York City.

confirmed by Judge Appleby, testifying in a deposition taken by plaintiffs on October 2, 1979 (entered in evidence at the District Court proceeding), to the effect that Hinds was not counsel (of record or in any way) in the criminal matter and had never appeared therein (104a).[3]

On January 20, 1977, NCBL held a press conference in New Brunswick at which Hinds, as spokesperson, expressed the view that, as a result of Judge Appleby's conduct, the trial was infected by racism (197a). He explained that in speaking about the *Chesimard* case he was acting in the same manner as he had done "on behalf of other defendants in my capacity as Director of the National Conference of Black Lawyers" (*ibid.*). At the press conference, Hinds said that the trial before Judge Appleby was "a travesty" and that Judge Appleby did "not have the judicial temperament and racial sensitivity to sit as an impartial judge;" Hinds also stated that the way Judge Appleby was questioning the jurors was leading to the creation of a "kangeroo court" (200a-201a). Some of those statements appeared in newspapers, such as the *Newark Star-Ledger* and the *New York Daily News* (66a, 67a).[4]

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[3] David Foley, the investigating member of the complaining ethics committee, acknowledged this fact in his report to the committee:

> "Mr. Hinds did not appear as attorney in either the criminal trial before Judge Appleby or on the petition to have the case removed from the state court to the federal court . . ." (73a).

Hinds was of counsel in a wholly separate civil proceeding in federal court relating to the conditions of Chesimard's confinement.

[4] The language testified to by Hinds is slightly different from that with which he was charged. The difference seems of no importance to the issues in this case.

Among other things, the *Newark Star-Ledger* article stated:

> "Hinds has represented Chesimard in a separate federal civil suit challenging the conditions of her isolation cell confinement in the Middlesex County Jail *but is not a member of the five-lawyer defense team . . .*" (67a; emphasis added.)

Following the newspaper references to Hinds's comments about the *Chesimard* trial, David Foley, a member of the Middlesex County Ethics Committee, wrote to the secretary of the committee requesting that he be permitted to investigate whether Hinds's comments constituted a violation of the disciplinary rules (65a). As Foley subsequently admitted, he knew at the time he wrote that Hinds was not an attorney of record in the trial (122a-124a).

At its February 1977 meeting the committee authorized Foley to investigate (128a). On February 24, 1977, Foley directed a letter to Hinds informing him that an ethics investigation had been authorized concerning his statements at the aforesaid press conference, and requesting a meeting (71a). Hinds declined to meet with the committee after establishing, by correspondence of William C. Moran, Jr., the committee's chairman, that his attendance was voluntary (81a).

The whole of Foley's subsequent investigation consisted of two telephone calls to newspaper reporters and correspondence with the N. J. Public Broadcasting Authority (75a). Foley made no effort to contact any of the parties or attorneys associated with the *Chesimard* trial—the prosecution, the defense, or the judge who presided, (131a-132a).

Some time between February and April of 1977, Foley prepared a revealing memorandum for his own files. It stated:

> "This matter should again be reviewed by the committee before we determine whether or not to file a statement of charges and have a hearing. There does not appear to be any specific violation of DR 7-106 and DR 7-107.
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> • • •
>
> "DR 7-107D speaks about lawyers making extrajudicial statements about 'other matters that are reasonably likely to interfere with a fair trial.' Also, DR 1-102(A)(5) states that, 'lawyers shall not engage in conduct that is prejudicial to the administration of justice.' These last two DR's are very general in scope and I do not believe they are intended to cover the conduct that is here in question." (78a)[5]

Despite his conclusion that Hinds's statements did not appear to be covered by DR 1-102(A)(5) or DR 7-107(D), Foley submitted a report to the Middlesex County Ethics Committee dated December 22, 1977 (73a) in which he recommended the filing of a statement of charges against Hinds alleging violations of those two disciplinary rules.[6]

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[5] Foley's memorandum also included other insights:

> "Nor does there appear to be a violation of DR 8-102, which deals with statements concerning judges. With regard to DR 8-102B, the rules state that 'a lawyer shall not knowingly make a false accusation against a judge.' If we proceed under this rule it would draw directly into question the truth or falsity of the statements made by Lennox Hinds which would, in essence, require us to determine the qualifications of Judge Appleby. This obviously we do not wish to do." (78a)

[6] In an effort to reconcile his recommendation that charges be filed (73a) with his file memorandum concluding there was no legal or factual basis for such charges (78a), Foley, under questioning during depositions, developed the theory that the sense of the memorandum resulted from a monumental typographical error (143a *et seq.*).

DR 1-102(A)(5) prohibits an attorney from engaging in conduct "prejudicial to the administration of justice." DR 7-107(D) provides that:

> "During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that he expects to be disseminated by means of public communication that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial . . ."

The only evidence presented to the committee by Foley in support of his recommendation was his personal opinion that the statements of Hinds, if accurately reported to the press, were prejudicial to the administration of justice and reasonably likely to have interfered with a fair trial (135a-136a).

In fact there was no evidence that Hinds's comments interfered with the trial. Indeed Judge Appleby in deposition testimony stated:

> "I don't think it had any impact on the trial whatsoever." (140a)

On December 29, 1977, the committee filed and caused to be served a statement of charges (30a-31a) against Hinds alleging violations of the two disciplinary rules referred to above. There is no charge that Hinds's statements interfered with the trial or even threatened to do so; rather, Hinds is simply charged with making a series of comments that were critical of Judge Appleby.

Moran, the committee chairman, acknowledged there was debate within the committee as to whether Hinds had been associated with the defense of Chesimard in the sense of the disciplinary rule, (158a-159a). All that the commitee had were newspapers articles that made conflicting statements as to whether Hinds was associated with the *Chesimard* defense; the committee also knew that Hinds had been engaged in a civil action relating to Chesimard's conditions of confinement, (160a). Doubtless a significant determinant of the committee's action was a report of a telephone conversation between M.M. DiLeo, secretary of the committee, and Robert Cowen, then secretary of the Disciplinary Review Board, (169a), who expressed his opinion that it did not matter whether or not Hinds was a member of the defense team, "he still would be subject to violation of the DR's by making public statements which would be disruptive of the trial" (80a).[7]

As is explained in detail *infra,* the function of the statement of charges is to call upon the charged party to file an answer, whereupon the chairman of the committee decides whether to order a hearing before a panel of the committee which in turn determines, on the basis of such hearing, whether to make a formal "presentment" (for serious infractions) or a recommendation of a letter of reprimand (for minor infractions) to the statewide Disciplinary Review Board. The district ethics committee has no power to adjudicate charges.

There have been no proceedings of any nature in this case before the district ethics committee since the filing of the statement of charges. Respondent Hinds did not

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[7] It is not clear what the phrase "disruptive of the trial" meant to Cowen and DiLeo or the committee, in light of the fact that no one on the committee solicited Judge Appleby's opinion of the effect of Hind's statements (104a).

file an answer to those charges. Instead, on February 10, 1978, Hinds, together with three black bar associations, filed a complaint in the United States District Court for the District of New Jersey, claiming that on their face and as applied the disciplinary rules violated the federal Constitution, (14a).

In the complaint the three organizations of black lawyers set forth their concern about this case in terms of their interests. All the organizations alleged that they engage in "educational activities comparable to the activities of the American Bar Association" in order to contribute to an understanding by the American people of the insidiousness, persistence and pervasiveness of racism and the need for its elimination from all aspects of our societal structure . . . [specifically including] the legal and judicial structure of the United States." The organizations explained that their members as lawyers with "special knowledge of the workings of the legal system . . . recognize a special duty to expose all aspects of racism within the legal and judicial system and to . . . employ plain words to express their ideas." (17a-18a).

After stating the facts with respect to the press conference called by the NCBL, at which Hinds spoke, and pointing out that Hinds was there expressing "the view of the National Conference as to the racial aspects of the foregoing prosecution . . .," the complaint alleges that the filing of charges against Hinds has communicated to their members, black lawyers, that if they seek to expose racism and use such language as they deem appropriate, they do so at their peril. The organizations complained that as a result they are directly impeded in carrying out their objective to expose racism in all its manifestations, including such as may be found in the legal system, (22a-23a).

Plaintiff Hinds asserted that as a result of the ethics committee proceeding he "will suffer serious and irreparable injury to his professional reputation as a lawyer, solely because he has exercised his constitutional rights, and he will be subjected to public scorn, censure, and ridicule on that account, and he and his organization (NCBL) will be obstructed in their intended presentation of the *Shakur* (*Chesimard*) case to the Human Rights Committee of the U.N. (25a).

Basing its claims upon the First, Thirteenth, and Fourteenth Amendments to the Constitution and upon 42 U.S.C., §1981 *et seq.*, the complaint alleges a violation of the constitutional rights of the "plaintiff organizations and their members and the individual plaintiff herein" (23a).

The first cause of action seeks injunctive relief against the continued processing of the complaint before the district ethics committee on the grounds that "the proceeding and the disciplinary rules upon which they are founded are unconstitutional" (28a). The second cause of action sets up a claim for declaratory relief to the effect that DR 1-102(A)(5) and DR 7-107(D) are unconstitutional "on their face and as applied" (26a). The constitutional deficiencies which are set out include violation of the First Amendment, vagueness, overbreadth, equal protection, failure to employ "less drastic means" when curbing speech, and the use of "an impermissible standard for regulating speech" (27a-28a).

Motions were then filed by the respondents for a preliminary injunction (37a) and by the petitioner to dismiss the complaint (52a). The motion of the respondents was supported by affidavits of Dr. George Jackson (38a) and Dr. Craig Polite (45a), both trained psychologists who set forth detailed scholarly analyses establishing the

chilling effect upon blacks of the disciplinary proceeding against Hinds.

During this period the district ethics committee voluntarily suspended its proceeding (Pet. Br. (Pb) 10, fn.).

The District Court denied respondents' motion for a preliminary injunction and granted petitioner's motion to dismiss on abstention grounds (56a).

On respondents' motion to alter or amend judgment (57a) under Rule 59(e), depositions were taken of Judge Appleby, Mr. Foley, and others, followed by two days of presentation of evidence before the court (64a-211a). The factual statement above set forth is based upon the exhibits and testimony there adduced. The lower court did not alter its earlier order dismissing the complaint but signed an order (214a) staying proceedings before the ethics committee pending appeal to the Court of Appeals for the Third Circuit.

On appeal, the Court of Appeals reversed, concluding that abstention was improper because the proceedings then pending before the district ethics committee did not afford "the predicate for *Younger* abstention—'the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved,'" citing *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973) (Pet. Cert. App. 21a). Additionally, relying on this Court's decision rendered last term, *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), the Court of Appeals analyzed the procedures governing the ethics committee and found that the case was still in the stage of threatened prosecution to which *Younger* abstention was inappropriate.

The state filed a petition for rehearing, to which it appended an affidavit by the Clerk of the Supreme Court of New Jersey, Stephen W. Townsend. By way of that affidavit, the state Supreme Court was heard for the first

time in this matter, stating that if that court were advised that such action would not violate the outstanding stay, it would bring the constitutional issues directly before it, leap-frogging proceedings before the ethics committee or the Disciplinary Review Board. The Court of Appeals denied the petition for rehearing emphasizing that "in reviewing a district court decision to abstain, the relevant facts are those which existed at the time of the district court's decision, *Kennecott Corp.* v. *Smith*, 637 F. 2d 181, 186 (3rd Cir. 1980)." (Pet. Cert. App. 33a). (See also, *Town of Lockport* v. *Citizens for Community Action*, 430 U.S. 259, 264, fn. 8 (1977)).

But taking note of the proposal of the Supreme Court of New Jersey, the Third Circuit in its opinion on rehearing said that it had not "intended to suggest that the New Jersey proceedings should be stayed pending the federal proceedings" (Pet. Cert. App. 36a), and stated that "the federal action does not presently bar state court adjudication of Hinds' First Amendment claim, nor could it in any event preclude the New Jersey Supreme Court from narrowing the construction of its own disciplinary rules." (Id. at 37a.)

Following the denial of the petition for rehearing by the Court of Appeals, the New Jersey Supreme Court on June 3, 1981, did what it had earlier suggested in the Townsend affidavit: pursuant to its Rule 2:12-1, the court certified to itself the complaint against Hinds then pending before the ethics committee to the end that "the entire record, including but not limited to, the constitutional challenges to DR 1-102 and DR 7-107(D) raised by respondent [Hinds], be considered by this Court." (Pet. Cert. App. 62a.) Thereafter, the New Jersey Supreme Court amended its rules, effective September 14, 1981, confirming that all constitutional questions were determinable only by the Supreme Court and not by the Disciplinary Review Board,

R. 1:20-2(j),[8] and providing, at least for the future, a mechanism whereby a motion could be made to the Supreme Court for leave to appeal constitutional issues on an interlocutory basis (R. 1:20-4(d)), while a matter is pending before the local ethics committee.

So the matter rested while this Court considered the petition for writ of certiorari. No further action was taken by the Supreme Court of New Jersey until one week after this Court's grant of the petition. Then, under date of November 9, 1981 the Supreme Court of New Jersey made an order directing the filing of briefs on "respondent's constitutional challenges to DR 1-102 and DR 7-107(D)" (Pb 1a). These briefs have indeed been filed and the matter has been set for oral argument befor the Supreme Court of New Jersey on February 9, 1982. For the convenience of the Court we have lodged with the Clerk of this Court copies of the brief in chief filed by respondent Hinds.[9]

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[8] The reference here is to the *Rules Governing the Courts of New Jersey,* which are promulgated by the Supreme Court of New Jersey. For the convenience of the Court, we are attaching as an appendix hereto a copy of the rules which establish the disciplinary procedure relevant to this case. We have indicated in the appended copy the amendments effective September 14, 1981.

[9] The constitutional issues presented to the Supreme Court of New Jersey include: the lawyer's right to criticize a judge, subject only to the requirement that there be no obstruction of justice, for which there is cited the Impeachment Trial of Judge Peck, referred to by this Court in *Nye* v. *United States,* 313 U.S. 33, 34 (1941); *Bridges* v. *California,* 314 U.S. 252 (1941); and *Cammer* v. *United States,* 303 U.S. 399, 406 (1956); *In re Little,* 404 U.S. 553 (1972); *cf., In re Sawyer,* 360 U.S. 622 (1959); the invalidity of DR 7-107(D) and DR 1-102(A)(5)

(Footnote continued on following page)

Thus, the state and federal constitutional challenges to DR 1-102(A)(5) and DR 7-107(D), on their face and as applied, are now before the New Jersey Supreme Court. Also before the court is the issue whether those rules, properly interpreted, apply to Hinds's comments.

(Footnote continued from preceding page)

on grounds of vagueness, for which there is cited *Chicago Council of Lawyers* v. *Bauer*, 522 F. 2d 242 (7th Cir. 1973), cert. den. 427 U.S. 912 (1976), and *Hirschkop* v. *Snead*, 594 F. 2d 356 (4th Cir. 1979); the invalidity of the rules on grounds of overbreadth, for which there is cited *NAACP* v. *Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978); the invalidity of the "reasonable likelihood" test as a standard for proscription of speech critical of a judge, for which is cited *Bridges* v. *California*, 314 U.S. 252 (1941).

It should be observed that the respondents' basic constitutional challenges to DR 7-107(D) have been acknowledged and accepted by the American Bar Association. In fact in 1978 the ABA Task Force on Fair Trial and Free Press, chaired by Judge Alfred T. Goodwin of the Court of Appeals for the Ninth Circuit, recommended the modification of the original ABA standards so as to substitute the test of "clear and present danger to the fairness of the trial" for the earlier standard of "reasonably likely to interfere with a fair trial." The recommendation also included a modification to eliminate that feature of Rule 7-107(D) which provides for an open-ended proscription of statements during a trial without a definition of the kinds of statements that are prohibited, as are found in DR 7-107(B).

The ABA approved the recommendations in its session in the Summer of 1978. But see "Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the Free Press-Fair Trial Issue," 87 F.R.D. 519 (1980).

A copy of the report of the Goodwin committee is appended to the brief before the Supreme Court of New Jersey, copies of which, as stated in the text, have been deposited with the Clerk of this Court.

During the period since the decision of the Third Circuit, the District Court has done nothing to interfere with the Supreme Court of New Jersey. Its only action was to enter an order vacating its prior order of dismissal and directing that the case "proceed in accordance with the mandate of the United States Court of Appeals" (Pb4a).

New Jersey's Lawyer-Discipline Procedure

The New Jersey bar disciplinary system extant as of April 1, 1978, is three-tiered.[10] At the first and lowest level of that system sit 12 district ethics committees composed of lawyers and lay persons. (The petitioner, Middlesex County Ethics Committee, has as of April 1, 1978, been consolidated into the District VIII Ethics Committee but the title of this case has not been changed.) The district committee must include at least two non-lawyers out of a committee of eight or more, R. 1:20-2(a). The function of the district ethics committee is investigative and prosecutorial. Upon its receipt of "information," presumably of alleged unethical conduct, the chairman of the committee assigns an attorney member to review such information, R. 1:20-2(h). The chairman, upon receipt of a report and recommendation from the reviewer, determines whether a formal complaint shall be filed.[11] The filing of the formal

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[10] Though the complaint herein was filed before April 1, 1978, the petitioner in its brief before the Court of Appeals acknowledged, and respondents agree, that "[i]t is within the parameters of these [new] rules that the present matter arose" (Appellee's brief, 6) and has been litigated.

[11] In this case it appears that the entire committee was involved in the decision, though under the rules the power to make such decision is vested in the committee chairman.

complaint is not a determination that a prosecution will proceed but rather that internal proceedings will be commenced to determine whether or not to start a prosecution. After service of the complaint, an answer must be filed, R. 1:20-2(j), upon which the matter is referred back to the original reviewer to investigate and report to the chairman as to whether a hearing is called for. "If on the basis of the report, the chairman finds no indication of unethical or unprofessional conduct," he may direct dismissal of the complaint. "If, on the basis of the report, the chairman finds a *prima facie* indication of unethical or unprofessional conduct, he shall direct the matter to proceed to a hearing," R. 1:20-2(k), before a panel of at least three persons, a majority of whom are to be lawyers, R. 1:20-2(m). That panel makes a report to the whole committee which may, on the basis of the report, take one of three steps:

1) It may send a letter dismissing the complaint, R. 1:20-2(o)(i);

2) It may recommend that a letter of private reprimand be sent by the Disciplinary Review Board, R. 1:20-2(o)(2);

3) It may prepare a Presentment[12] to the Disciplinary Review Board, R. 1:20-2(o)(3).

Thus, the ethics committee has no power whatever to adjudicate or impose punishment. All further action must be taken by the Disciplinary Review Board, the next tier in the disciplinary system.

The Disciplinary Review Board hears all presentments issued by district ethics committees "*de novo* on the full record on notice to all interested parties," R. 1:20-3(e). It

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[12] A presentment, in New Jersey parlance, is an accusatory instrument in the nature of an indictment or prosecutorial information. *In re Grand Jury*, 10 N.J. 23 (1952).

renders a formal decision on each matter presented, makes findings of fact and conclusions as to each issue presented, and makes specific recommendations as to disciplinary action to be taken. *Ibid.* Unlike the district ethics committee, the Review Board has the power to issue a private reprimand to a charged attorney, which is ultimately filed with the Administrative Director of the Courts, R. 1:20-2 (o)(2). If a more serious penalty is in order, the matter is presented by the Review Board to the Supreme Court, the third and highest tier, for review and final disposition, R. 1:20-4a. There for the first time constitutional issues are considered and adjudicated, R. 1:20-2(j).

Summary of Argument

I.

Younger abstention has been applied only to state "judicial proceedings," *Fair Assessment* v. *McNary*, 50 U.S. L.W. 4017, 4020 (1981), which provide an "opportunity to raise and have timely decided by a competent state tribunal the Federal issues involved," *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973). Since 1793, when the Anti-Injunction Act was passed, both Congress and this Court have addressed problems of the relations between federal and state courts, a consideration essential to our system of dual sovereignty. That statute, now embodied in 28 U.S.C., §2283, prohibits federal courts from enjoining "proceedings in a state court." Numerous decisions in this Court established that the Anti-Injunction Act applied only to pending judicial proceedings and did not apply to other proceedings within a state, such as prosecutorial or administrative proceedings.

Abstention doctrines limiting actions under 42 U.S.C., §1983 were expounded by this Court in *Younger* shortly

before it decided that §1983 constituted an exception to the Anti-Injunction Act. Nevertheless abstention doctrines in *Younger* were rooted in the policies reflected in the Anti-Injunction Act and the basic doctrines of equity jurisprudence, comity, and federalism which are embodied therein. While there has been much debate within this Court as to whether *Younger* abstention applies to different kinds of state civil proceedings as contrasted with criminal proceedings as originally expounded in *Younger*, there is no question that *Younger* abstention does not go beyond state *judicial* proceedings reflecting the outer limits of the application of 22 U.S.C., §2283. Only this term this Court reiterated that it had never applied *Younger* abstention except to judicial proceedings.

In recent cases the Court has fleshed out the meaning of the requirement that *Younger* applies only to "judicial" proceedings by emphasizing that a state proceeding, in order to merit abstention, must be one which offers an "opportunity to raise and have timely decided by a competent state tribunal the Federal issues involved"—the *Gibson* v. *Berryhill* standard. In extending *Younger* abstention to different types of civil judicial proceedings, *Moore* v. *Sims*, 442 U.S. 415 (1979); *Juidice* v. *Vail*, 430 U.S. 327 (1977); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977), this Court has focused upon whether the state tribunal satisfies that requirement.

In each case, the Court engaged in a detailed analysis of the state proceedings to determine whether they provide procedures that satisfy standards announced in *Gibson, supra.*

II.

The Court of Appeals made precisely the kind of inquiry that this Court has been prescribing in recent decisions, and determined that the proceedings before the eth-

ics committee did not satisfy the *Gibson* standard because that body had no power to adjudicate the federal constitutional issues. In fact, the ethics committee is but a prosecutive body.

The state argues that the *Gibson* standard is satisfied because the Supreme Court of New Jersey has the ultimate power to pass upon federal constitutional questions, when the matter finally reaches that court, and because Hinds could have sought interlocutory appeal to that court. It is clear, however, that the availability of a judicial forum for *ultimate* determination of constitutional issues does not render *Younger* abstention appropriate when the case is not pending before that forum and is still only in the pre-prosecutorial stage. As to the matter of interlocutory appeal, such was not provided for in the court rules as of the time of this proceeding. Even if interlocutory review was provided, any such appeal would have been discretionary. And this Court has held that a possible, discretionary appeal does not satisfy the *Gibson* requirements, a rule which flows from traditional equity concepts.

The petitioner argues also that the ethics committee, being an arm of the Supreme Court of New Jersey, must be given the deference accorded that body. Yet this Court emphasized only last term in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980) that a court exercises a range of power—legislative, judicial, and enforcement. Even if the committee be considered an agent of the Supreme Court, at the point where the committee is determining whether to prosecute a lawyer on an ethics violation it is performing an enforcement function for which *Younger* abstention is definitely not available. Prosecutors "are natural targets for §1983 injunctive suits," *id.* at 736, notwithstanding that they appear to be functioning as an arm of, or on behalf of, a court.

III.

The organizations of black lawyers which are parties to this proceeding have independent standing to argue their claims as to the unconstitutionality of the disciplinary rules. The proceedings against Lennox Hinds directly threaten the ability of such organizations to carry out their programs to expose racism in all of its manifestations including such as may be found in the legal system. Nor are the organizations in any way subject to *Younger* abstention even if the same were held applicable to Hinds. There is plainly no state proceeding in which these organizations are involved and in which they can vindicate their constitutional claims. There is nothing in the record which suggests that, at least with respect to two of the organizations (Garden State Bar Association and the Association of Black Women Lawyers), there is the kind of unity of interest which should subject them to any rule of abstention that might be applicable to Hinds.

IV.

In view of the changes that have occurred since the grant of the petition for the writ of certiorari the Court may wish to dismiss the petition as having been improvidently granted. In the present posture of the case, the Court may consider that it is being asked to determine a case of only "isolated significance" or that it is being pressed to render an advisory opinion.

ARGUMENT

I. *Younger* abstention is appropriate only where there is a pending state "judicial" proceeding, *Fair Assessment* v. *McNary*, 50 U.S.L.W. 4017, 4020, which provides an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973).

As the proceeding statement of facts makes clear, the crux of this matter is a threatened ethics prosecution of a New Jersey attorney by a local grievance committee under disciplinary rules which are subject to serious constitutional challenge. The issue by no means involves the ordinary grist of attorney disciplinary proceedings, such as use of trust funds, excessive fees, or conflict of interest. Instead, the substantive question is whether certain disciplinary rules offend the First and Fourteenth Amendments.

And those rules are not state-centered; they reflect New Jersey's adoption of rules proposed by the American Bar Association in 1971, and thereafter widely adopted by state and federal courts.[13] The substantive constitutional challenges to disciplinary rule 7-107D have thus far received only scant consideration in state judicial systems, *Application of Marksfield* v. *Association of the Bar of the City of New York*, 370 N.Y.S. 2d 82 (1973), but extensive consideration in *Chicago Council of Lawyers* v. *Bauer*, 522 F. 2d 242 (7th Cir. 1975), *cert. den.* 427 U.S. 912 (1976)

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[13] The ABA proposals were modeled after the recommendations of the Advisory Committee on Fair Trial and Free Press of the American Bar Association (1968) and the Report of the Committee of the Judicial Conference of the United States on the Operation of the Jury System on the Free Press/Fair Trial issue, 45 F.R.D. 391 (1968).

(federal court rules); *Hirschkop* v. *Snead*, 495 F. 2d 356 (4th Cir. 1979) (action for declaratory judgment in U.S. District Court re Virginia state rules).

While the disciplinary rules at issue have been widely adopted, the disciplinary *procedures* employed in New Jersey appear to be unique.

Upon receiving a notice from the local ethics committee that a statement of charges was being filed against respondent Hinds, the respondents, including both Hinds and a group of organizations of black lawyers that considered that they and their members were threatened by the proceeding turned to the federal courts to vindicate their constitutional rights. And they did so before the commencement of the prosecution against Hinds. As explained in detail above, the statement of charges reflects *not* the commencement of a prosecution but rather a step in the investigative process by which the committee determines *whether* it wishes to initiate a prosecution.

The issue in this case as presented to the Court of Appeals was: Whether the federal court in the circumstances of this case should exercise its juridiction to consider the claim of the respondents that the threatened ethics prosecution violated federal constitutional rights? Is exercise of federal jurisdiction barred by the *Younger* doctrine?

A. The historical development of the relationship between federal and state courts in our system of dual sovereignty establishes that federal courts do not defer to state bodies or their agencies performing non-judicial investigative or prosecutorial functions.

From the inception of the Republic, the system of dual sovereignty has given rise to tension between the courts of both sovereigns. The earliest attempt to resolve that conflict found expression in the Anti-Injunction Act of

1793, now codified as amended in 28 U.S.C. §2283.[14] Described as "a limitation of the powers of the federal courts dating almost—from the beginning of our history and expressing an important congressional policy—to prevent needless friction between state and federal courts," *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 8 (1939), the Act provided that federal courts might not issue injunctions "to stay proceedings in any court of a state," 1 Stat. 335, 22, §5. "The provision expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court." *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 132 (1941).

Passed within two weeks of the decision in *Chisholm* v. *Georgia*, 2 Dall. (U.S.) 419 (1793), holding state subject to suit in federal court, the Anti-Injunction Act reflected the same desire to insulate state sovereignty from the federal judicial power which impelled adoption of the Eleventh Amendment in response to *Chisholm*. While the Eleventh Amendment sought to protect the state sovereignty itself from the power of federal courts, the Anti-Injunction Act demonstrated a specific regard for state *judicial* power.

With the decisive victory of the unitary federal power in the Civil War, a revised view of the relationship between state and federal governments was in order. As Justice Stewart pointed out in *Mitchum* v. *Foster*, 407 U.S. 225 (1975), the post-Civil War constitutional amend-

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[14] Currently:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

ments were the "product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century," *id.* at 242. Congress gave statutory expression to the rights established by the Civil War amendments by creating remedies for violation of those rights and granting jurisdiction to the federal courts to vindicate those rights; 28 U.S.C. §§1331 and 1343; 42 U.S.C., §§1971, 1981, 1982, 1983, and 1985. "The very purpose of §1983 was to interpose the federal courts between the States and their people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law . . .," *ibid.*

Ultimately it has come to be recognized that 42 U.S.C., §1983 was intended by the Reconstruction Congress as an explicit exception to the Anti-Injunction Act (hereinafter §2283), *Mitchum* v. *Foster, supra.*

Nevertheless, as we will show *infra,* the concerns of §2283 remain relevant to analysis of federal abstention doctrines developed in the §1983 context. Thus it is worthwhile to trace the historical development of §2283 in the post-Civil War period.

Issues of federalism in the period between the Civil War and the 1920's arose in the context of the enormous economic expension which posed anew the question of the relationship of state and national power. The new view of federal power which the Reconstruction Congress had framed was consonant with the development for the first time of a truly national economy whose major actors went beyond state boundaries and often were in conflict with narrow state interests. The paradigmatic conflict of the period was between a national corporation and a state legislature determined to restrict it. Resolution of that conflict was inevitably destined for the federal courts which by their nature had a national perspective.

Ex parte Young, 209 U.S. 123 (1908), is the exemplar of the new relationship between federal courts and state action. There the Minnesota legislature sought to limit the power of railroads operating in the state by creating a railroad commission which set (and cut) rates charged for transporting freight and passengers. When the Attorney General of Minnesota indicated that he would seek to enforce the rate-cutting regulations of that commission through criminal prosecutions in state court, railroad stockholders asked the federal court to enjoin the Attorney General. In agreeing to restrain that state officer, this Court freed federal courts from the shackles of the Eleventh Amendment. Thereafter, those courts were able to provide broad judicial protection of federal rights against encroachment by state officers. After *Ex parte Young*, federal courts were the "guarantor of basic federal rights against state power," *Mitchum* v. *Foster*, *supra*, at 239. Though the Anti-Injunction Act continued to protect state courts, it was not to be a limitation on the power of federal courts to restrain entities other than state *courts*:

> "The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, and no power to do the latter exists because of a power to do the former." *Ex parte Young*, *supra*, 209 U.S. at 163.

Since the *Young* era, the first inquiry as to the availability of federal power against state action has been whether that power was to be exercised to restrain state judicial, or non-judicial, action. So long as the relief sought was against the latter, traditional equitable principles would apply in determining whether the injunction would issue. If, however, restraint was sought against state judicial power, §2283 remained a bar (with a few limited exceptions, *e.g.*, bankruptcy) to the exercise of fed-

eral jurisdiction. In the *Young* period, there is a line of cases revealing careful examination as to the nature of the state power which suitors seek to enjoin, an examination into whether or not state action is adjudicative.

In *Mississippi Railroad Commission* v. *Illinois Central Railroad Co.*, 203 U.S. 209 (1906), this Court, in affirming a grant of federal injunctive relief against a state railroad commission, cast aside the commission's argument that such relief was barred by the Anti-Injunction Act. The Court said: "The commission is, however, not a court, and is a mere administrative agency of the state." *Id.* at 341. Nor did it matter to the Court that the proceeding initiated before the railroad commission would ultimately arrive in the state courts:

> "It is urged, however, that proceedings in a state court were commenced by the presentation of the petition of the citizens of Magnolia to the railroad commission, and because the commission, having made an order to stop the trains, would have to resort to the proper state court to aid it in the enforcement of its order, therefore the whole proceeding must be regarded as in a state court from the commencement. Whatever may be the provision in the state statute in regard to the enforcement solely by the state court of the order of the railroad commission, the proceeding while before the commission never thereby became a proceeding in a state court, and the jurisdiction of the Federal court to enjoin the commission from the enforcement of its order, because such order was a violation of the Federal Constitution, was not in the least affected." *Ibid.*

Accord, *McNeill* v. *Southern R. Co.*, 202 U.S. 1142 (1906); see also, *Prentis* v. *Atlantic Coast Line Ry. Co.*, 211 U.S. 210 (1908) (the Anti-Injunction Act did not bar restraint

of a state body acting in its legislative, and not its adjudicative, capacity), discussed at length *infra*.

In *Public Service Co.* v. *Corboy*, 250 U.S. 153 (1919), this Court reversed a federal district court that had declined, on jurisdictional grounds, to enjoin a state drainage commission. The Court, citing *Prentis, supra*, reasoned that "the prohibitions which the [anti-injunction] statute imposes secure only the right of state courts to exert their *judicial* power . . . in other words to a power falling within the general limitation of things judicial as demarked by the great distinction between legislative, executive and judicial power . . ." *Id.* at 161; emphasis added. See also, *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175 (1920), ruling that the anti-injunction statute was designed "to prevent unseemly interference with the orderly disposition of *litigation* in the state *courts* . . ."[15] *id.* at 183; emphasis added; *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285 (1952); *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 132 (1941); *Bacon* v. *Rutland Railroad Company*, 232 U.S. 134 (1914); *Louisville & N. R. Co.* v. *Garrett*, 231 U.S. 298, 307 (1913).

The continued vitality of the "distinction" referred to in *Corboy, supra*, at 161, is highlighted by the citation in this Court's opinion in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 737 (1980), "of the myriad of . . . cases since *Ex parte Young*," holding the exercise of non-adjudicative state power subject to federal restraint.

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[15] Even when a federal court is examining the actions of a state court, it is not the label "court" or "judge" which is dispositive but the nature of the activities in which it is engaged. *Ex parte Virginia*, 100 U.S. 339 (1880). The recent counterpart of this holding is *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), where the Court carefully analyzed the details of the actions of the Supreme Court of Virginia and showed that some of them were legislative, some prosecutive, and some adjudicative. The application of these cases to the instant matter is set forth in Point II(B) below.

B. Abstention, as articulated in *Younger* v. *Harris*, does not extend to state bodies and functions not encompassed by 28 U.S.C., §2283.

Younger v. *Harris* was decided when the question of the applicability of the Anti-Injunction Act to cases arising under 42 U.S.C., §1983 had not yet been resolved, although as the Court noted in *Mitchum* v. *Foster, supra*, the question of the relationship of the two statutes "has lurked in the background of many of our recent cases," 407 U.S. at 226. Anticipating the decision that came only one year later in *Mitchum*, that §1983 was an explicit exception to §2283, the Court felt that it still had to address the tensions between federal and state courts exercising concurrent jurisdiction in actions brought under §1983. In addressing that tension the Court turned to the policies and doctrines underpinning §2283.

Younger points to three related sources for its abstention doctrine:

1. The policy reflected in the Anti-Injunction Act, "manifest[ing] a desire to permit state courts to try state cases free from interference by federal courts," 401 U.S. at 43.

2. "[T]he basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43-44.

3. The intertwined "notions" of "comity" and "Our Federalism" which in sum amount to "a proper respect for state functions." *Id.* at 44.[16]

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[16] "Our Federalism" is an expression that has arisen coextensively with this Court's pronouncements on the anti-injunction statute. See the opinions of Justice Frankfurter interpreting the Anti-Injunction Act in *Toucey* v. *New York Life Ins. Co., supra*, 314 U.S. at 141; *Hale* v. *Bimco Trading Co.*, 306 U.S. 375, 378 (1939).

Referring to the first basis for *Younger*—28 U.S.C., §2283—it is apparent that it applies only to state judicial proceedings, see pp. 26-27, *supra*. While there has been debate in this Court as to whether *Younger* abstention applies to all state civil proceedings,[17] it is at least clear that abstention does not apply to those cases of a non-adjudicative nature which would also be outside the prohibitions of §2283, as this Court confirmed only this term in *Fair Assessment* v. *McNary*, 50 U.S.L.W. 4017 (1981).

The other bases of *Younger* are equally restricted to circumstances under which deference is to be shown to state judicial proceedings.

The import of *Younger's* equity foundation is that there exist an adequate remedy at law. Restated in the abstention context, "an adequate remedy" translates into "the opportunity to raise and have *timely* decided by a *competent state tribunal* the Federal issue involved." *Gibson* v. *Berryhill, supra,* at 577; emphasis added. Thus, the opportunity for a judicial determination of the issue—speedily and by a competent tribunal—is at the heart of *Younger's* equity origins.

Comity, the third source of the *Younger* doctrine, has also been a source for 28 U.S.C., §2283 and, like equity, in the *Younger* context it cautions no more than deference to state *adjudicative* proceedings. Indeed, as this Court em-

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[17] The debate has centered about the step-by-step extension of *Younger* to certain types of state proceedings of a non-criminal nature. See, *Moore* v. *Sims*, 442 U.S. 415 (1979); *Juidice* v. *Vail*, 430 U.S. 327 (1977); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). As of the present time it is recognized that *Younger* abstention "do[es] not apply to all civil proceedings," White, J., dissenting from denial of petition for writ of certiorari in *United Air Lines* v. *Division of Industrial Safety of California*, 50 U.S.L.W. 3298.

phasized in *Wells Fargo & Co.* v. *Taylor, supra,* the Anti-Injunction Act

> "is intended to give effect to a familiar rule of comity, and *like that rule, is limited in its field of operation.* Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state *courts* and is salutary; but to carry it beyond that field would materially hamper the Federal courts . . . [and would be] antagonistic to our dual system of *courts.*" 254 U.S. at 183; emphasis added.

Abstention, in giving effect to comity, is similarly limited in its field of operation to state courts. Indeed, it could not be otherwise, for to extend the abstention doctrine derived from equity, comity, and federalism beyond the boundaries of "our dual system of *courts,*" *Wells Fargo, supra* (emphasis added), would eviscerate 42 U.S.C., §1983. That landmark statute is specifically directed at "every person" acting under color of state law.

If *Younger* abstention is extended beyond state adjudicative proceedings to carve an exception to federal jurisdiction requiring deference to state officials, be they engaged in adjudicative or non-adjudicative proceedings, then the exception—*Younger*—consumes the rule—§1983. The fact that a person was acting under color of state law would then provide a predicate for abstention instead of a trigger for the exercise of federal judicial power to protect constitutional rights.

In order that 42 U.S.C., §1983 not be so reduced "Abstention from the exercise of federal jurisdiction [must be treated as] the exception, not the rule . . ." *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 813 (1976).

And so it is that in *every* case in this Court where abstention has been granted since *Younger*, the state body for which abstention is granted is a court. While there is an indication in *Gibson* v. *Berryhill*, *supra*, that "administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings," 411 U.S. at 576-77, it is clear that such would be the case only where the proceedings are in fact adjudicative and not prosecutorial.[18] Thus as recently as this term the Court, per Justice Rehnquist, has said *Fair Assessment* v. *McNary*, *supra*:

> "These modern expressions of comity have been limited in their application to federal cases which seek to enjoin state *judicial* proceedings, a limitation which we do not abandon here." 50 U.S.L.W. at 4020; emphasis added.

C. Under *Younger*, a state body to which deference is to be accorded must be one which "provides an opportunity to have timely decided by a competent state tribunal the federal issues involved."

In the original application of *Younger*, definition of the state proceedings for which federal abstention was appropriate was not troublesome. It is easy enough to see that criminal proceedings to which the putative federal

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[18] As put by Justice Holmes in *Prentis* v. *Atlantic Coast Line*, *supra*:

> "We shall assume, as we have said, that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States." 211 U.S. at 225-26.

plaintiff is a party-defendant allow such potential plaintiff the opportunity to have constitutional claims adjudicated. Absent circumstances such as those described in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), the opportunity may be said to exist in state criminal proceedings for the adjudication of constitutional claims. As this Court said in *Kugler* v. *Helfant,* 421 U.S. 117 (1975):

> "The policy of equitable restraint expressed in *Younger* v. *Harris,* in short, is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." 421 U.S. at 124.

A much more difficult problem in the application of *Younger* principles developed when this Court took steps toward extending *Younger* abstention to the civil forum. Here the question posed was whether those who sought to vindicate their federal constitutional rights could do so in an ongoing state proceeding of a non-criminal nature, that is, one in which it was not a foregone conclusion that "the threat to the plaintiff's federally protected rights . . . [could] be eliminated by his defenses against a single criminal prosecution," *Younger,* 401 U.S. at 46. Civil actions present so many more procedural variations than do criminal prosecutions that the Court was required to develop formulations which fit the new trend.

Whether the potential federal plaintiff can raise and have adjudicated the alleged "threat to [his] federally protected rights" in the non-criminal proceeding became one of the central inquiries in those cases taking *Younger* abstention beyond deference to an ongoing state criminal prosecution. The current formulation suited to the adequacy of state *civil* proceedings is whether the proceeding provides "the opportunity to raise and have timely decided by a competent state tribunal the Federal issues involved,"

Gibson v. *Berryhill, supra,* at 577. We will demonstrate *infra,* pp. 35 *et seq.,* that the state proceeding here provided no such opportunity.

Huffman v. *Pursue, supra,* 420 U.S. 592, is the first case to hold that *Younger* abstention extends beyond the traditional criminal proceedings.[19]

Following *Huffman,* in a series of cases further extending the non-criminal application of *Younger,* this Court increasingly emphasized the necessity for detailed inquiry into the adequacy of the state forum for which deference is sought.

Thus, in *Juidice* v. *Vail,* 430 U.S. 327 (1977), the test of the appropriateness of *Younger* abstention in the civil context is stated as whether the plaintiffs have "an opportunity to fairly pursue their constitutional claims in ongoing state proceedings," *id.* at 327. In *Juidice,* the state's contempt procedure was analyzed and held to provide a timely and appropriate hearing mechanism for raising and having decided constitutional challenges to that procedure, with an appeal from such decision as of right.

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[19] Contrary to petitioner's argument (Pb15), *Huffman* does not stand "for the proposition that review of constitutional issues at the appellate judicial system . . . is sufficient 'opportunity' for *Younger* [abstention] purposes." In *Huffman,* the Court barred "federal *post-trial* intervention . . . designed to *annul* the result of a state trial." 420 U.S. at 609; emphasis added. As the Court's language indicates, the bar applies only where a putative federal plaintiff has actually litigated his claim in the state courts, received an adverse opinion from the state courts on that claim, and has failed to appeal to the state appellate courts. See, *Hicks* v. *Miranda,* 422 U.S. 332, 351, n. 20. In the case presently before the Court, Hinds does not even have a mechanism for raising his constitutional claims before the district ethics committee. See pp. 40, n.24, *infra.* He is thus far removed from the point where he could be required to pursue an appeal through the state courts before seeking federal intervention.

In *Trainor* v. *Hernandez*, 431 U.S. 434 (1977), this Court was presented with a lower court decision that the proceeding sought to be enjoined was not quasi-criminal but purely civil, and therefore not subject to abstention. But Justice White, for the majority, held that the focus of the District Court's inquiry had been misdirected.

The majority found that the court below had failed to address the crucial question whether the prospective federal plaintiffs "could have presented their federal due process challenge to the attachment statute in the pending state proceeding," *id.* at 447 and remanded the matter to the District Court for determination of that question.[20]

Indeed, upon remand, the District Court found the Illinois attachment proceeding did not provide a forum adequate to trigger *Younger* abstention and that decision was summarily affirmed by this Court, *Hernandez* v. *Finley*, 471 F. Supp. 516 (E.D.N.D. Ill. 1978), aff'd. summarily *sub nom. Quern* v. *Hernandez*, 440 U.S. 952 (1979), see pp. 36-37, *infra*.

Moore v. *Sims*, *supra*, 442 U.S. 415, is another case in which there was no division within the Court on the fact that the *sine qua non* of abstention is that the ongoing proceeding in the state court provide the opportunity to litigate the constitutional challenge. The issue which evoked the dissent of four Justices related exclusively to the question whether the particular procedures within the state court satisfied that standard.

In the next point we will delineate the specific guidelines this Court has approved for inquiry into the adequacy of a state forum in the context of *Younger* ab-

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[20] At least one of the dissenters, Justice Stevens, was willing to find the absence of a "plain, speedy and efficient remedy" on the record already made and without remand. *Id.* at 460.

stention and demonstrate that the Third Circuit's opinion is precisely in accord therewith.

Petitioner's brief ignores the fact that at least since *Ex parte Young* and consistently thereafter, this Court has drawn a distinction between the stance that federal courts take to state adjudicative proceedings as distinguished from that which they take to non-judicial proceedings. Nowhere is petitioner's position more clearly demonstrated than in the 15 times it refers in the course of its brief[21] to "state proceedings," avoiding the use of the words "court" or "judicial" to describe the "proceedings" for which abstention is appropriate. *Fair Assessment, supra.* By its use of the term "state proceeding," petitioner seeks to elude the grip of concrete analysis, to wit, whether the ongoing state proceeding is of the specific type to which *Younger* abstention applies.

II. The state disciplinary proceeding pending against respondent Hinds at the time of the filing of the federal complaint did not provide an opportunity to raise and have timely decided Hinds's constitutional challenge.

The Court of Appeals found that the proceedings before the district ethics committee did not provide an opportunity to raise and have timely decided by a competent state tribunal the Federal issue involved," *Gibson, supra,* 411 U.S. at 577. Against that finding petitioner offers two arguments:

1. Though the district ethics committee is plainly not an adjudicative body competent to pass upon federal con-

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[21] Pb13, para. 1, line 4; para. 2, line 2; Pb17, fn. para. 1, lines 16, 18; Pb18, para. 1, line 2; fn. para. 1, lines 2 and 3; Pb19, para. 1, line 9; Pb22, para. 1, line 7; para. 2, line 5; Pb27, para. 1, lines 15 and 19; Pb29, para. 2, lines 1 and 7; Pb32, line 8.

stitutional claims, the possibility that Hinds could persuade the Supreme Court of New Jersey to exercise its discretion to grant leave for an interlocutory appeal of the constitutional challenge means there *is* such a body in the offing. (Pb27)

2. The ethics committee must be deemed a competent adjudicative body because it is the *agent* of a competent adjudicative body, to wit, the New Jersey Supreme Court (Pb24-25):

In making these arguments, petitioner ignores precedent in this Court that squarely resolves the issue.

A. The state's two lines of argument on the adequacy of the state proceeding here runs squarely *contra* to this Court's decisions.

1. The Court of Appeals, having made precisely the kind of inquiry that this Court has directed, correctly decided that the disciplinary proceeding did not provide the predicate for Younger abstention—the opportunity to have federal issues timely decided by a competent tribunal.

As noted above, this Court pointedly remanded *Trainor* v. *Hernandez* to the lower court for its ruling on whether "appellees [the federal plaintiffs] could have presented their federal due process challenge to the attachment statute in the pending state [attachment] proceedings," 431 U.S. at 447.

The lower court began, correctly,, by rejecting the notion that "state courts may be *presumed* capable of adjudicating federal constitutional issues," *Hernandez* v. *Finley, supra,* 471 F. Supp. at 518; emphasis added, and after a close analysis of the local statutes and court rules found

a) that the constitutional challenges could perhaps—but not with certainty—be raised in the context of the attach-

ment proceeding by a motion addressed to the lower court to quash the attachment, and

b) that there was no interlocutory appeal as of right from the denial of such a motion and, said the court, "the possibility of eventual appeal is no substitute for the right to an immediate appeal challenging . . . current deprivation," *id.* at 520.

The court accepted plaintiff's contention

> "that the Illinois attachment procedure does not provide an adequate forum in which to raise their constitutional claim since the Act does not afford a plain, speedy, efficient and certain remedy for review of their claim." *ibid.*[22]

That approach and its conclusion were approved by this Court in its summary affirmance of the three-judge court's decision.[23] In stating that available state procedures did not afford "a plain, speedy, efficient and certain remedy," *ibid.*,

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[22] See also, *Lessard* v. *Smith,* 413 F. Supp. 1318, 1320 (E.D. Wis. 1976). Accord: *Doe* v. *Maher,* 414 F. Supp. 1368 (D. Conn. 1976), finding, on remand from this Court, *sub nom. Roe* v. *Norton,* 422 U.S. 391 (1975), in connection with Connecticut's welfare statute, that a state contempt proceeding did not provide an adequate forum for constitutional claims. *Maher* was reviewed again by this Court in *Maher* v. *Doe,* 432 U.S. 526 (1977), and remanded for further proceedings on the merits.

See also the pre-*Younger Caulder* v. *Durham Housing Authority,* 433 F. 2d 998, 1002 (4th Cir. 1970), *cert. den.* 401 U.S. 1003 (1971).

[23] The summary affirmance of the foregoing decision, 440 U.S. 952 (1979), is a decision on the merits. *Hicks* v. *Miranda,* 442 U.S. 332 (1975). For while such an affirmance may not have the same precedential value as an opinion of the Court, *Tully* v. *Griffin, Inc.,* 429 U.S. 68 (1976), it is nevertheless controlling unless and until reexamined by the Court, *id.* at 74.

the federal district court invoked *Younger's* equitable footing. It has in fact always been a principle of federal equity that a remedy adequate at law is not one which is speculative: "Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law," wrote Justice Cardozo in *American Life Ins. Co.* v. *Stewart,* 300 U.S. 203, 214 (1937), quoting *Davis* v. *Wakelee,* 156 U.S. 680, 688 (1895). There must, if a law remedy is to be deemed equal to a federal equitable remedy, be "equality in efficiency," "equality in certainty," and "equality in promptness," *id.* at 215. Where federal equity courts have found state appellate remedies doubtful, they have not hesitated to declare the remedy at law inadequate to justify witholding equitable relief. See, *e.g.,* Justice Holmes's opinion in *Wilson* v. *Southern R. Co.,* 263 U. S. 574 (1924), affirming a decree for injunctive relief where, *inter alia,* it was questionable whether crucial legal issues concerning confiscatory action of a state tax commission could be raised via a state appellate channel, the Court noting, "How far such an appeal would be adequate . . . may be doubted, and the adequacy of a remedy at law must be clear," *id.* at 577.

It is not only *Younger's* equitable footing that compels the finding that mere availability of discretionary review of constitutional issues does not render the state forum adequate. Fundamental notions of respect for constitutional rights likewise compel such a result. Constitutional rights are not so trivial that they may be left to discretionary treatment. *Cf. e.g., Williams* v. *Georgia,* 349 U.S. 375 (1955); *Largent* v. *Texas,* 318 U.S. 418, 421-22 (1943).

The Third Circuit in the instant matter made precisely the inquiry that this Court directed in its remand of *Trainor* and properly followed this Court's subsequent summary affirmance of the lower court's determination.

After an extensive analysis of the pertinent New Jersey court rules and applicable New Jersey decisional law, the Third Circuit found that:

> —"There is no provision in any of the rules for a legal or constitutional determination at the Ethics Committee stage." *Ibid.*
>
> —There was no "Rule of the Supreme Court of New Jersey which would have insured judicial consideration of Hinds' constitutional claim at the time the complaint was filed in the District Court," *Id.* at 33a.
>
> —"[W]hile the Supreme Court of New Jersey might now interpret its rules to permit it *sua sponte* to certify a disciplinary matter before it, see R. 2:12-1, such discretionary action by the court is not the equivalent of an established procedure whereby an attorney may obtain a judicial determination of his or her constitutional claim before being required to undergo disciplinary proceedings before two tiers of ethics committees." *Id.* at 34a.

The gravamen of the state's response is that although the district ethics committee could give Hinds no relief as to his constitutional claims, it is analytically wrong to "isolate" that stage of the proceedings: in the fullness of time, and with the workings of the ethics machinery, Hinds would have received attention to his constitutional claims.

But the opportunity to raise and have decided constitutional issues is not an opportunity when it is "down the road." See, *Mississippi Railroad Commission* v. *Illinois Central Railroad, supra,* discussed at p. 26.

And in light of the summary affirmance on remand of *Trainor,* it is simply not relevant to the determination of

the character of the proceedings against Hinds that by discretionary appeal or ultimate direct appeal following a lengthy prosecutorial process, the Supreme Court of New Jersey might some day choose to adjudicate Hinds's federal claims.[24]

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[24] The Court of Appeals made its analysis of the disciplinary rules before the amendments thereto effective September 14, 1981. Petitioner insists these rules "memorialize" the old procedure (Pb26). Respondent has no doubt this is true as to the addition of R. 1:20-2(j): "All constitutional questions shall be withheld [from the district ethics committee] for consideration by the Supreme Court after final decision."

Petitioner further insists that the addition of R. 1:20-4(d)(i) also "memorializes" the previous practice:

> "Interlocutory Review. An aggrieved party may file a motion for leave to appeal with the Supreme Court to seek interlocutory review of a constitutional challenge to proceedings pending before the District Ethics Committee or the Disciplinary Review Board. The motion papers shall conform to R. 2:8-1. Leave to appeal may be granted only when necessary to prevent irreparable injury."

Respondents agree with the Third Circuit that this rule does *not* memorialize procedures prevailing at the time of the ethics proceeding against Hinds; he had no right to an interlocutory appeal then (see Pet. Cert. App. 33a). The case cited by petitioner (Pb25), *In re Logan*, 70 N.J. 222 (1976), in no way establishes such an interlocutory channel. There the New Jersey Supreme Court heard an attorney's federal claims not by way of interlocutory appeal but rather upon a plenary hearing before that court after hearings before the county ethics committee had been concluded and had resulted in a presentment to the Supreme Court, *id.* at 224. In any event, given this Court's affirmance of the *Trainor* remand, the discretionary availability of an interlocutory appeal in no way establishes the adequacy of the *ethics committee* as a body competent to adjudicate Hinds's federal claims.

2. The Court of Appeals correctly decided, in accordance with this Court's decision in Supreme Court of Virginia v. Consumers Union, that at the level of the district ethics committe the disciplinary proceedings were prosecutive, not adjudicative.

In *Supreme Court of Virginia* v. *Consumers Union, supra*, this Court, per Justice White, ruled that insofar as the Supreme Court of Virginia enacted rules governing the conduct of the bar, it acted in a "legislative capacity," *id.* at 731; insofar as it "hear[s] appeals from lower court decisions in disciplinary cases," it performs an "adjudicative task," *id.* at 734; and insofar as it "initiate[s] proceedings against attorneys," it functions in an "enforcement [prosecutive] capacity," *id.* at 736. In this latter capacity, the Supreme Court of Virginia and its Chief Justice were not immune from federal injunctive restraint because "[p]rosecutors are natural targets for §198 injunctive suits," *ibid,* citing *Ex parte Young.*

In this case, after applying the *Consumers Union* analysis and making a full examination of the rules, the Court of Appeals concluded:

> "It is . . . evident that the adjudicative stage had not been reached at the stage of the proceedings before the District Ethics Committee. * * * [I]f we were to analogize these proceedings to state criminal proceedings, the case against Hinds is still at the pre-indictment stage. As in the criminal proceedings, the prosecutor's office is not the appropriate stage at which the federal plaintiff's constitutional rights can be vindicated." Pet. Cert. App. 18a-19a.

In finding that the district ethics committee was performing a prosecutive, non-adjudicative role, in looking beyond the judicial label of the state action to its func-

tional essence, the Court of Appeals acted in accord with long-settled principles. See *Roudebush* v. *Hartke,* 405 U.S. 15 (1972) and especially *Prentis* v. *Atlantic Coast Line Ry. Co.,* 211 U.S. 210 (1908) relied upon therein, *id.* at 21.

In *Prentis, supra,* in determining whether a body was acting judicially, Justice Holmes set forth the following definition:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist . . ." 211 U.S. at 226.

Further said the Court in *Prentis*:

> "The nature of the [state proceeding's] Final Act, determines the nature of the previous inquiry. * * * [if] the 'Final Act' was a judgment of fines and other penalties, the nature of the inquiry would be deemed adjudicative." *Id.* at 227.

The "final act" is determinative,

> "no matter what may be the general or dominant character of the body in which they may take place . . . That question depends not upon the character of the body, but upon the character of the proceedings. *Ex parte Virginia,* 100 U.S. 339." *Id.* at 226.

It is noteworthy that *Ex parte Virginia,* cited by *Prentis* as a source of its analysis, involved a finding that the acts of a state judge (excluding blacks from jury panels) were not adjudicative, the Court there ruling that

> "Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent." 100 U.S. at 348.

The "nature of the final act" of the district ethics committee establishes beyond peradventure that the proceedings pending against Hinds at the time of his federal filing were not adjudicative in character, but prosecutive; for the final act of the Middlesex County Ethics Committee was by no means an "order . . . adjudging or enforcing . . . the penalties established by law," *Prentis*, 211 U.S. at 225; it by no means "declare[d] and enforce[d] liabilities as they stand on present and past facts and under laws," *id.* at 226; the ethics committee could adjudicate and enforce nothing; it could not disbar, nor suspend, nor even reprimand Hinds.

Under New Jersey Court Rules, the potential final acts of the ethics committee are:

1. A decision, either by the committee chairperson, R. 1:20-2(k), or by the entire body, not to prosecute an attorney alleged to have committed unethical practices.

2. A decision to prosecute an attorney alleged to have committed unethical practices, which decision takes the form of

a) Issuance of a recommendation to a higher body, known as the Disciplinary Review Board, to issue a letter of private reprimand to the charged attorney, R. 1:20-2(o)(2); or

b) Issuance of a "Presentment" which is forwarded to the Disciplinary Review Board for further proceedings, R. 1:20-2(o)(3).

Since the only potential final acts of the district ethics committee are a decision to prosecute or not to prosecute, its proceeding must be taken as prosecutive under *Prentis* and its progeny.

Petitioner claims that the district ethics committee *is* in effect part of the Supreme Court of New Jersey, cit-

ing *Toft* v. *Ketchum*, 18 N.J. 280 (1955) (Pb24, 31). In dictum in that case, deciding that filings with a local ethics committee were privileged from suit for malicious prosecution, the court spread its mantle to protect those with complaints against attorneys, stating that "the filing with one of our ethics and grievance committees is in effect a filing with the Supreme Court," *id.* at 284. This benign myth, however useful it might be to avoid "the suppression of legitimate charges against attorneys who have been guilty of unethical conduct," *id.* at 286, is not the appropriate test for purposes of *Younger* abstention.[25] Both now and at the time *Toft* was decided, the function of the local ethics committee was to make the decision whether to prosecute; at no time have the local committees ever exercised the Supreme Court's adjudicative functions. As *Consumers Union*, supra, teaches, it is not the label a court applies that is determinative (the Supreme Court of Virginia there claimed judicial immunity when this Court found it was in fact legislating) but the function that is being performed. See also, *Ex parte Virginia*, supra. When the chairman of

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[25] Some idea of the mythical nature of *Toft* as applied to this case may be gleaned from the following:

Although the proceeding against Hinds has been extant since February 1977 (71a), the petition for rehearing filed before the Court of Appeals includes a statement that prior to March 9, 1981, "the specifics of the constitutional claim advanced by Lennox Hinds had not been brought to the attention of the full court," Pet. for Reh. 5, though Hinds had informally alerted the disciplinary Review Board to the constitutional issues in the case (216a).

And this is hardly surprising. The Supreme Court of New Jersey has established a three-tiered disciplinary procedure for the precise purpose of insulating itself from the myriad of disciplinary cases that are process by the local committees. There are "1800 new matters coming before all ethics bodies in New Jersey each year." See, New Jersey 30th Annual Judicial Conference, Reports and Transcripts, 1978, at p. 36.

the district ethics committee is considering whether to dismiss a complaint or to convene a hearing for the purpose of determining whether to prosecute the Disciplinary Review Board, the Supreme Court of New Jersey is not exercising an adjudicative function.

The state argues that the Court of Appeals has mistakenly perceived a "chasm" between the district ethics committee and the New Jersey Supreme Court (Pb21). What the state calls a "chasm" is nothing more than a recognition of the reality set out in *Consumers Union* that when a court assembles under its aegis judicial, legislative, and prosecutive powers it is in fact exercising three distinct functions.

The "chasm" between the ethics committee and the Supreme Court is not bridged by the argument that the Supreme Court may ultimately rectify constitutional violations of the ethics committee, any more than the chasm between the prosecutor's office and the state court is bridged by the fact that the prosecutor's office is part of the criminal justice system subject to ultimate supervision by a court. "This is not the way the law has developed," *Consumers Union, supra,* 446 U.S. at 737. Instead, "prosecutors [like the district ethics committee] are natural targets for §1983 injunctive suits." *Id.* at 736.

Far from "undermin[ing] the *Younger* doctrine" as petitioner suggests, the Third Circuit properly recognized that "[i]f we were to apply *Younger* abstention in this case, we would extend it far beyond any holding of the Supreme Court." Pet. Cert. App. 21a.

The Third Circuit is not alone among the Circuit Courts in its determination that not all pending bar disciplinary proceedings are adequate predicates for *Younger* abstention. In *Foley* v. *Alabama State Bar,* 648 F. 2d 355 (5th Cir. 1981), the court found *Younger* abstention inappro-

priate where a matter pended before an Alabama bar disciplinary committee, *id.* at 356, holding that "there is no indication that appellants may vindicate their constitutional rights in the state bar disciplinary proceedings and thus we have no mandate to abstain from entertaining this suit," *id.* at 360. See also, *Morial* v. *Judiciary Commission of the State of Louisiana,* 565 F. 2d 295 (5th Cir. 1977); cert. den. 435 U.S. 1013 (1978), *en banc,* ruling that "*Younger* principles are not involved by the mere fact that federal relief has an impact upon state governmental machinery; even in its quasi-criminal extensions, *Younger* dismissal is called for only in those circumstances where successful defense of a state enforcement proceeding . . . would fully vindicate the federal plaintiff's federal right," *id.* at 299.

Although other federal court decisions, including those cited in petitioner's brief at 20 and 33, apply *Younger* abstention in deference to disciplinary proceedings, a careful review of the cases reveals that in all but one of them the state proceedings for which the federal court had abstained, had already reached an adjudicative stage.[26]

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[26] See, *Gipson* v. *New Jersey Supreme Court,* 558 F. 2d 701 (3rd Cir. 1977) (abstention appropriate where a disciplinary proceeding had advanced to the New Jersey Supreme Court before federal relief was sought); *Erdmann* v. *Stevens,* 458 F. 2d 1205 (2nd Cir. 1972) (federal injunctive relief denied after a state adjudicative process initiated); *anonymous* v. *Bar Association of Erie County,* 515 F. 2d 435 (2nd Cir. 1975), *cert. den.* 423 U.S. 840 (1976) (abstention appropriate where a plenary state adjudicative process initiated); *Anonymous* v. *Bar Association of ciation of the Bar of the City of New York,* 515 F. 2d 427 (2nd Cir. 1975).

See also, *American Civil Liberties Union* v. *Bozardt,* 539 F. 2d 340 (4th Cir. 1976), *cert. den.* 429 U.S. 1022 (1976) (*Young-*

(Footnote continued on following page)

III. There is no factual basis for abstention as to the organizational respondents that assert claims independent of those of respondent Hinds.

Three organizations of black attorneys, also respondents in this action, alleged a) that the threatened prosecution of Lennox Hinds for criticism of a judge undermines their own and their members' rights of free speech, assembly and association to the end of eliminating racism and b) that the rules constituting the basis

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(Footnote continued from preceding page)

er abstention appropriate where disciplinary proceedings pended before a board of commissioners with power to make findings of guilt or innocence); *Goodrich* v. *Supreme Court of the State of South Dakota,* 511 F. 2d 316 (8th Cir. 1975) (*Younger* abstention appropriate where recommendation of disbarment pending before state supreme court); *Rosenthal* v. *Carr,* 614 F. 2d 1219 (9th Cir. 1980) (*Younger* abstention appropriate where disciplinary proceedings had reached the stage of a formal hearing before injunctive relief sought); *Tedesco* v. *O'Sullivan,* 420 F. Supp. 194 (D. Conn. 1976) (*Younger* abstention appropriate where federal plaintiff sought to enjoin imposition of sentence of disbarment following a full-scale criminal trial); *Niles* v. *Lowe,* 407 F. Supp. 132 (D. Hawaii 1976) (*Younger* abstention appropriate where injunction sought against Disciplinary Officer with plenary adjudicative power); *Tepper* v. *State Bar of Wisconsin,* 489 F. Supp. 115 (E.D. Wis. 1980), aff'd. 636 F. 2d 1222 (7th Cir. 1980) (abstention appropriate where state disciplinary proceedings were before board with authority to discipline); *Seraphim* v. *Judicial Conduct Panel,* 483 F. Supp. 295 (E.D. Wis. 1980) (abstention appropriate where complaint alleging misconduct before state supreme court).

Only in *Doe* v. *State Bar of California,* 415 F. Supp. 308 (N.D. Cal. 1976), aff'd. 582 F. 2d (9th Cir. 1978), has a federal court abstained from enjoining what appears to have been the initial prosecutorial phase of a state bar proceeding. To the extent *Doe, supra,* was based upon *Younger,* it appears to be wrongly decided.

of the threatened prosecution of Hinds are unconstitutional facially and as applied.

In its opinion, the Third Circuit first noted that, since it ruled abstention inappropriate in regard to Hind's claim, it need not rule as to respondent organizations (Pet. Cert. App. 22a).[27] Later, in its opinion on the petition sur rehearing, the Court of Appeals noted that in light of "*New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church* v. *N. J. State Board of Higher Education*, 654 F. 2d 868 (3d Cir. 1981), [it saw] no basis for the suggestion . . . that the district court will be obliged on remand to dismiss the suit." *Id.* at 35a-36a.

It is first of all apparent that respondent organizations have standing to assert their rights of association, assembly, and free speech on their own behalf, because they and their members are directly engaged in activities which the petitioner's enforcement of a challenged disciplinary rules would curtail. *NAACP* v. *Button*, 371 U.S. 415, 428 (1963); *Chicago Council of Lawyers* v. *Bauer*, *supra*. In the complaint, respondent organizations allege that their purposes include the elimination of racism in American life. More specifically, as bar associations, each feels a duty to expose such racial bias as exists in the judicial system—an activity protected by the First and Fourteenth Amendments, *Button*, *supra*. See also, *Allee* v. *Medrano*, 416 U.S. 802 (1974).

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[27] The issue of the applicability of *Younger* principles to the organizational plaintiffs was fully briefed and argued in the district court. Although not raised on appeal, it was adverted to by the Court of Appeals in its opinion (Pet. Cert. App. 35a-36a) and it is clear that the issue may be raised in this Court as an independent ground for affirmance, *Dandridge* v. *Williams*, 397 U.S. 471, 475, n. 6 (1970). See also, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977); *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435-36 (1923).

Petitioner alleges that the respondent organizations have no federal claim independent of respondent Hinds. In fact, the post-*Younger* cases make clear that, even if abstention from Hinds's claim were appropriate, abstention as to the organizational claims would be inappropriate.

In *Steffel* v. *Thompson, supra,* it was held that a non-party to a pending state proceeding who was threatened by a state criminal prosecution could bring a claim for declaratory relief in federal court without fear of preclusion on the basis of *Younger*. The plaintiff in *Steffel* had been distributing leaflets on behalf of an anti-war committee. Another member of that organization had been arrested and charged for engaging in the same activity and Steffel had every reason to fear such a prosecution if he resumed leafletting. The Court, in permitting plaintiff's claim to be tried in federal court, held that:

> "[F]ederal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." 415 U.S. at 475.

Doran v. *Salem Inn, Inc.,* 422 U.S. 922 (1975), extended the holding of *Steffel* to cover claims made for federal *injunctive* relief, under very similar circumstances. There, two plaintiff corporations which operated topless bars were allowed to seek an injunction against the enforcement of a city ordinance against such operations, in spite of the fact that another plaintiff corporation was already being prosecuted under the ordinance. Justice Rehnquist reasoned that *Younger* abstention could not be applied to the non-prosecuted corporation precisely because "no state proceedings were pending against [it]." 422 U.S. at 930.

In *Hicks, supra,* the Court reached the opposite result because the federal plaintiff, although not a party to the pending state adjudicative proceeding, was the employer of the state defendants whose claims were legally identical.

Petitioner asserts (Pb17, fn.) that *Hicks* is fully applicable here. The record does not bear out petitioner's contention. Nothing in the record suggests that the claims of all the federal plaintiffs are identical. In fact, nothing in the record establishes any relationship between Hinds and two of the organizational respondents (Garden State Bar Association and the New Jersey Association of Black Women Lawyers) other than a common social goal, to wit, eradicating racism.

In *Doran, supra,* Justice Rehnquist pointed out that the fact that each of several plaintiff corporations had engaged in similar business practices and had similar problems was not enough to mandate *Younger* preclusion (where one of the said corporations was involved in a state proceeding) since they were "apparently unrelated in terms of ownership, control, and management." 422 U.S. at 929. Questions of this nature would be the subject of an evidentiary hearing on remand to the District Court, exactly as the Court of Appeals implied, Pet. Cert App. 36a.

IV. Respondents suggest that the Court may wish to dismiss the petition for certiorari as having been improvidently granted.

The unusual developments in this case since the granting of the petition for writ of certiorari suggest that this Court may wish to reconsider the original grant of the petition.

As stated above, under date of June 3, 1981, following the decision of the Court of Appeals denying rehearing, the Supreme Court of New Jersey certified to itself the

case then pending before the ethics committee. After this Court's grant of the petition for writ of certiorari, the Supreme Court of New Jersey ordered the filing of briefs and scheduled oral argument for February 9, 1982.

The case is now in a wholly different posture from that which was extant when the Court granted the petition. This Court may well determine that, in view of developments since then, the case has only "isolated significance," *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 76 (1955), or that the Court is being asked to give "advisory opinions on abstract questions of law," *Princeton University* v. *Schmid*, No. 80-1576, 1/12/82, 50 U.S.L.W. 416.

The Court of Appeals decision on rehearing was carefully molded so as to retain federal jurisdiction in the District Court while permitting the Supreme Court of New Jersey to address the matter so as perhaps to render a ruling by the federal court unnecessary. The Court of Appeals thus appears sensibly to have exercised judicial discretion even where principles of abstention were not applicable.[28] *Cf.*, concurring opinion of Chief Justice Burger in *Gibson* v. *Berryhill*, *supra*, 411 U.S. at 580. In view of the imminence of the decision by the Supreme Court of New Jersey, the matter can be left with the District Court acting on the mandate of the Court of Appeals for disposition after the New Jersey Supreme Court has acted. It is possible that the decision of the New Jersey Supreme Court will afford complete relief. If not, the fed-

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[28] The inapplicability of *Younger* abstention we believe is clearly established in the opinion of the Court of Appeals and in this brief. Since serious overbreadth and vagueness are basic elements of the claim of unconstitutionality, there is no possibility of *Pullman* abstention, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941); see *Bagget* v. *Bullitt*, 377 U.S. 360, 375-80 (1964).

eral action may proceed and there will in fact be no interference with the proceedings in the state court.[29]

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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[29] There will be no issue of *res judicata*. Respondent Hinds, in his brief to the Supreme Court of New Jersey, made an express reservation reserving his right to have the Federal court determine his Federal questions. That reservation appears at p. 51 of Hinds' brief in the New Jersey Supreme Court, copies of which have been filed with the Clerk of this Court.

* Counsel wish to acknowledge the valuable assistance in the preparation of this brief of William C. Cunningham, S.J., and Elizabeth C. Yeampierre, a student intern at the Center for Constitutional Rights.

APPENDIX

RELEVANT RULES OF THE SUPREME COURT OF NEW JERSEY RELATING TO DISCIPLINE OF MEMBERS OF THE BAR

RULE 1:20. DISCIPLINE OF MEMBERS OF THE BAR

1:20–1. Disciplinary Jurisdiction

Every attorney authorized to practice law in the State of New Jersey, including those specially authorized for a limited purpose or in connection with a particular proceeding, shall be subject to the disciplinary jurisdiction of the Supreme Court as set forth in the Constitution of 1947, Article 6, Section 2, Paragraph 3.

To assist in the administration of its disciplinary function, the Supreme Court shall establish, in accordance with these rules, District Ethics Committees, Fee Arbitration Committees, a Disciplinary Review Board and shall maintain a Division of Ethics and Professional Services in the Administrative Office of the Courts.

Note: Adopted February 23, 1978 to be effective April 1, 1978. Any matter pending unheard before a County Ethics Committee as of April 1, 1978 shall be transferred, as appropriate, to the District Ethics Committee or the District Fee Arbitration Committee having jurisdiction. Any matter heard or partially heard by a County Ethics Committee by April 1, 1978 shall be concluded by such Committee and shall be reported on in accordance with these rules; amended July 16, 1981 to be effective September 14, 1981.

1:20–2. District Ethics Committees

(a) Disciplinary Districts. The Supreme Court shall establish, and may from time to time alter, disciplinary districts consisting of defined geographical areas and shall appoint in each such district a District Ethics Committee which shall consist of such number of members, not fewer than eight, as the Court may determine, at least 4 of whom shall be attorneys of this State maintaining offices within the district and at least 2 of whom shall not be attorneys but shall reside in the district.

* * *

(e) Function. Each District Ethics Committee shall, in accordance with these rules, review and act upon all information submitted to it by a complainant, the Supreme Court, the Administrative Director of the Courts, the Disciplinary Review Board or otherwise brought to its attention regarding alleged unethical conduct which, if proved, would constitute grounds for disciplinary action. Unless specifically directed to the contrary by the Administrative Director of the Courts, it shall not act upon such information involving an attorney whose principal office is not within the district but shall refer that information to the Administrative Director of the Courts for appropriate disposition. A district committee shall not render advisory opinions.

* * *

(h) Prehearing Procedure. The Chairman of the District Ethics Committee shall assign a member of the Committee who is an attorney to review preliminarily all information received by the Committee and to make such inquiry as may be necessary in order to determine whether or not a complaint should be filed. A request for appropriate assistance may be made to the Division of Ethics and Professional Services. The reviewer shall report in writing to the Chairman his recommendation as to whether further proceedings should be held, or whether the matter should be closed for absence of an indication either of unethical or unprofessional conduct or a need for further investigation. If the Chairman concludes that the matter should be closed, he shall direct the Secretary to close the matter and to so advise the complainant, the attorney and the Administrative Director of the Courts, each of whom shall be furnished with a copy of the written report. An aggrieved complainant shall have a right of appeal to the Disciplinary Review Board as provided by R. 1:20–3(d). If the Chairman concludes that further proceedings should be had, a complaint shall be filed.

(i) Complaint. Every complaint shall be in writing, signed and sworn to, and filed with the Secretary of the Committee in quadruplicate. It shall state the names and addresses of the complainant and the attorney complained against, the facts constituting the alleged improper conduct by the attorney, the disciplinary rules asserted to have been violated, and so far as known whether the same or a similar complaint has even been made to and considered by any ethics committee. The Secretary shall, where necessary, assist the complainant in preparing the complaint and, when instructed to do so by the Chairman, shall act as complainant.

(j) Service; Answer. Immediately upon receipt of a complaint, the Secretary shall make written acknowledgment thereof to the complainant. He shall forthwith serve a copy on the attorney named therein, either personally or by ordinary mail, and mail a copy to the Administrative Director of the Courts. The Secretary shall open a separate file for each complaint and properly index it. The attorney shall, within 10 days after the service of the complaint upon him, file a written answer thereto in quadruplicate with the Secretary, who shall thereupon forward one copy to the complainant and one copy to the Administrative Director of the Courts. In his answer the attorney may set forth circumstances of a mitigating nature bearing on the charge and shall set forth any constitutional challenges to the proceedings. All constitutional questions shall be withheld for consideration by the Supreme Court as part of its review of the final decision of the Disciplinary Review Board. Interlocutory relief may be sought only in accordance with R. 1:20-4(d)(i).

(k) Investigation as to Complaint. Unless good cause appears for referring it to another committee member, each complaint filed pursuant to subparagraph (h) of this rule shall be referred by the Chairman to the member of the committee who conducted the preliminary inquiry for such further investigation as may be necessary to determine whether the matter should proceed to hearing. The Central Ethics Unit may be requested to assist. The investigating member shall report in writing to the Chairman as to whether there is a *prima facie* indication of

Effective 9/14/81

unethical or unprofessional conduct and whether the matter should proceed to hearing.

If, on the basis of the report, the Chairman finds no indication of unethical or unprofessional conduct, he shall direct the Secretary of the Committee to mark the complaint dismissed and so advise the complainant, the respondent and the Administrative Director of the Courts, each of whom shall be furnished a copy of the report. An aggrieved complainant shall have the right of appeal to the Disciplinary Review Board as provided by R. 1:20–3(d).

If, on the basis of the report, the Chairman finds a *prima facie* indication of unethical or unprofessional conduct, he shall direct that the matter proceed to hearing on at least ten days written notice to all interested parties.

The investigating member shall not thereafter participate in the matter as a member of the hearing panel, but he may be designated as the Presenter.

* * *

(m) **Panels; Hearing.** The hearing shall be before a hearing panel of at least three members, a majority of whom shall be attorneys. The Committee Chairman shall designate the members of the hearing panel and its Chairman who shall be an attorney. A quorum for the hearing of any matter shall consist of at least three members of the Committee. The determination of a matter shall be made by a majority of the membership sitting on the panel, provided a quorum is present. When by reason of absence, disability or disqualification the number of members of the panel able to act is less than a quorum, the Chairman of the Committee shall appoint a temporary member or members of a panel.

The hearing shall be conducted formally and in private but the strict rules of evidence need not be observed. A complete stenographic record shall be made by an official court reporter assigned for that purpose by a supervising court reporter in the district. All witnesses shall be duly sworn. The complainant and the attorney against whom he has complained shall have the right to be present at all times during the hearing with their attorneys, if any.

(n) **Findings and Report.** The panel shall prepare a written dated report containing its findings of fact and conclusions on each issue presented. Any member of the panel not concurring therein may prepare a separate report.

(o) **Disposition.** The District Ethics Committee, following preparation of the report of the panel, shall take one of the following actions:

(1) If the panel finds that there has been no unethical or unprofessional conduct, the Secretary shall be directed to send to the complainant and the respondent a letter of dismissal in a form approved by the Administrative Director of the Courts, together with a copy of the report. A copy of the report and the letter of dismissal shall also be sent to the Administrative Director of the Courts.

(2) If the panel finds that there has been unethical or unprofessional conduct for which a private reprimand constitutes adequate discipline it shall submit a proposed letter of reprimand together with a copy of its report to the Disciplinary Review Board for its review. The letter of private reprimand as approved or modified by the Disciplinary Review Board, together with a copy of the report, shall be sent by the Secretary to the complainant and the respondent. The Secretary shall also send a copy of the report and the letter of private reprimand to the Administrative Director of the Courts.

(3) If the panel finds that there has been unethical conduct for which a private reprimand does not constitute adequate discipline, it shall prepare a Presentment and serve a copy thereof either by personal service or ordinary mail upon the respondent. It shall also furnish a copy of the Presentment to the complainant, the Administrative Director of the Courts and the Disciplinary Review Board. The transcript of the hearing shall be prepared forthwith and copies thereof furnished to the respondent, the District Ethics Committee and the Disciplinary Review Board. The Committee shall also forward to the Board the record of all proceedings before it resulting in the Presentment and the briefs, if any, which were filed with it.

(p) Subpoenas. On application by the presenter or the respondent at the time of hearing or, at any time prior to hearing upon the application of the member assigned to investigate a complaint, the Committee may, in accordance with rules promulgated by the Disciplinary Review Board, issue subpoenas to testify and subpoenas duces tecum in its name and signed either by its Secretary, any member of the Committee, or the Assistant Director of the Division of Ethics and Professional Services. The attendance fee, which need not be prepaid, shall be paid by the Administrative Office of the Courts. Subpoenas issued under this rule may be enforced by the Superior Court in the manner provided by R. 1:9–6 in the case of a subpoena of a public officer or agency.

Note: Adopted February 23, 1978, to be effective April 1, 1978; paragraphs (a), (h), (*l*) and (m) amended on January 17, 1979, which were superseded on March 2, 1979 to be effective April 1, 1979; and paragraphs (n) and (o) restored on March 22, 1979 to be effective April 1, 1979; subparagraph (*l*)(3) deleted and new paragraph (p) adopted June 19, 1981 to be effective immediately; paragraphs (c), (h), (j) and (*l*)(1)(i) amended July 16, 1981 to be effective September 14, 1981.

1:20–3. Disciplinary Review Board

(a) Appointment; Officers. The Supreme Court shall appoint a Disciplinary Review Board consisting of 9 members, at least 5 of whom shall be attorneys of this State and at least 3 of whom shall not be attorneys. Members shall be appointed for 3-year terms and may be reappointed in the Supreme Court's discretion. The Supreme Court shall annually designate a Chairman and Vice Chairman of the Board from among its members. The Secretary shall be a staff member of the Division of Ethics and Professional Services appointed annually by the Administrative Director of the Courts. The Board shall maintain such offices as may be designated by the Administrative Director of the Courts.

* * *

(d) Appeals from Final Action

(1) Actions Subject to Review. The Disciplinary Review Board shall review, upon the filing of an appeal, the following actions taken by a District Ethics Committee:

(i) A pre-complaint determination that there is no indication of unethical or unprofessional conduct.

(ii) A pre-hearing determination concluding that there has been no unethical or unprofessional conduct.

(iii) A post-hearing determination concluding either that there has been no unethical or unprofessional conduct or that a private reprimand constitutes adequate disciplinary action.

(2) Perfection of Review. A person aggrieved by an action of a District Ethics Committee set forth in subparagraph (d) (1) of this Rule may, within 30 days after receipt by him of notice of the action, file with the Secretary of the Disciplinary Review Board a notice of appeal in the form prescribed by the Administrative Director of the Courts and shall serve a copy thereof by ordinary mail upon the respondent and the Secretary of the District Ethics Committee. The Secretary of the District Ethics Committee shall within 30 days thereafter furnish to the Disciplinary Review Board the record of the proceedings before the Committee together with any briefs filed with it. At its request the Disciplinary Review Board shall be furnished with a copy of the transcript of the hearing, if any. The complainant or presenter may within said 30 days file a supplementary brief with the Disciplinary Review Board and the respondent may file a supplementary answering brief within 10 days thereafter.

(3) Hearing; Disposition. The review by the Disciplinary Review Board shall be *de novo* on the record with or without oral argument as it shall in its discretion determine. It shall by written determination affirm or modify the action taken by the District Ethics Committee or remand the matter to it for such further proceedings as it may direct.

(e) Proceedings on Presentment. All Presentments received by the Disciplinary Review Board shall be promptly heard *de novo* on the full record on notice to all interested parties. Oral argument shall be had upon the request of any party or upon the Board's request. The Board shall render a formal decision on each matter, which shall include findings of fact and conclusions

as to each issue presented, and shall make a specific recommendation as to the appropriate disciplinary action, if any, to be imposed by the Supreme Court. Such recommendation may include a provision that the respondent be ordered to make reimbursement in whole or in part of the expenses incurred in the prosecution of the disciplinary proceedings. Constitutional challenges to the proceedings not raised before the District Committee shall be preserved, without Board action, for Supreme Court consideration as a part of its review of the matter on the merits. Interlocutory relief may be sought only in accordance with R. 1:20-4(d)(i). The Disciplinary Review Board's decision shall be promptly filed with the Clerk of the Supreme Court and the Administrative Director of the Courts and served upon the parties by mail.

* * *

(i) Temporary Suspension. The Disciplinary Review Board, where necessary to protect the interests of an attorney, a client or the public, may on its own motion or on the motion of a District Ethics Committee, the Central Ethics Unit or the Administrative Director of the Courts, recommend to the Supreme Court that an attorney be suspended temporarily from practice upon such terms and conditions as it deems appropriate.

Note: Adopted February 23, 1978 to be effective April 1, 1978; paragraphs (a), (e), (g), (h) and (i) amended July 16, 1981 to be effective September 14, 1981.

* * *

1:20-4. Action by the Supreme Court

(a) Review of Final Disciplinary Recommendations. The Supreme Court shall review all decisions of the Disciplinary Review Board recommending discipline beyond a private reprimand and all directions made by the Board for reimbursement of expenses. The review shall be on the basis of the decision, the transcript of the hearing, if any, before the Disciplinary Review Board, the

briefs, if any, filed with the Board, and the record of the proceedings before the District Ethics Committee. If the Disciplinary Review Board recommends disbarment or suspension from the practice of law for a period greater than one year, the record shall be supplemented by the filing of briefs and by oral argument before the Supreme Court in accordance with R. 2:5, 2:6 and 2:11, insofar as applicable. In all other matters, a motion for leave to file further briefs or for oral argument may be filed with the Supreme Court within 10 days after the filing with the Court of the Disciplinary Review Board recommendation and of the service upon respondent of a copy thereof.

(b) Review of Recommendation of Temporary Suspension. When the Disciplinary Review Board recommends a temporary suspension pursuant to R. 1:20–3(i), the Supreme Court shall issue an order to show cause thereon, and further proceedings shall be taken pursuant to R. 1:20–4(d). In an emergent situation the Supreme Court may order a temporary suspension together with an order to show cause why the temporary suspension should not be continued.

* * *

(d) Constitutional Issues.

(i) Interlocutory Review. An aggrieved party may file a motion for leave to appeal with the Supreme Court to seek interlocutory review of a constitutional challenge to proceedings pending before the District Ethics Committee or the Disciplinary Review Board. The motion papers shall conform to R. 2:8–1. Leave to appeal may be granted only when necessary to prevent irreparable injury. If leave to appeal is granted, the record below may, in the discretion of the Court, be supplemented by the filing of briefs and oral argument.

(ii) Final Review. In any case in which a constitutional challenge to the proceedings has been properly raised below and preserved pending review of the merits of the disciplinary matter by the Supreme Court, the aggrieved party may, within 10 days of the filing of the report and recommendation of the Disciplinary Review Board, seek the review of the Court by proceeding in accordance with the applicable provisions of R. 1:19–8.

Effective 9/14/81

(e) Review of Other Matters. All recommendations of the Disciplinary Review Board other than those otherwise referred to in this rule shall be reviewed by the Supreme Court on the full record below, supplemented as it may order on its own or a party's motion.

* * *

Note: Adopted February 23, 1978 to be effective April 1, 1978; paragraph (a) amended January 10, 1979 to be effective immediately; new paragraph (d) adopted and paragraphs (d) and (e) redesignated (e) and (f) July 16, 1981 to be effective September 14, 1981.

Petitioner's Reply Brief

NO. 81-460

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,
Petitioner,

vs.

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,
Respondents.

REPLY BRIEF FOR PETITIONER

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NO. 81-460

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OCTOBER TERM, 1981

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vs.

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINDS,
Respondents.

REPLY BRIEF FOR PETITIONER

Preliminary Statement

As noted in Petitioner's brief in this case, the Supreme Court of New Jersey directly certified the Lennox Hinds disciplinary proceeding, including the underlying constitutional challenges to the attorney disciplinary rules in question, on June 8, 1981 (Brief for Petitioner at 11). Briefs on the constitutional issues were subsequently filed pursuant to the state supreme court's scheduling order of November 10, 1981 (*Id.*).

Subsequent to the filing of Petitioner's brief in the instant case, the Supreme Court of New Jersey heard arguments on the constitutional issues on February 9, 1982. The state court reserved decision at that time.

Respondents herein moved this Court on February 10, 1982 for an order dismissing the writ of certiorari as improvidently granted. The Court denied the motion on February 22, 1982.

ARGUMENT

POINT I

Since Respondents' constitutional claims are now pending before the Supreme Court of New Jersey for disposition, Respondents clearly have availed themselves of the opportunity to have such claims decided by a competent tribunal, and the federal complaint must be dismissed under the *Younger* v. *Harris* abstention doctrine.

The precise holding of the Third Circuit below was that "the predicate for *Younger* [v. *Harris*, 401 U.S. 37 (1971)] abstention—'the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved' "—was lacking (Pet. App. 21a). The court reached this conclusion despite the fact that the complaint never alleged that such an opportunity was lacking (J.A. 26a)*.

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* Respondents never alleged that a competent state tribunal was unavailable to hear and timely decide their claims. Rather, they alleged that since the attorney disciplinary rules they wished to challenge had been promulgated by the Supreme Court of New

(Footnote continued on following page)

Indeed, the district court observed: "The plaintiffs have not alleged that Hinds will not be afforded an opportunity to present his constitutional claims in the disciplinary proceedings." (Pet. App. 50a). Moreover, the Third Circuit's conclusion was directly contrary to settled state law which indicated that the Supreme Court of New Jersey maintains complete authority over attorney disciplinary proceedings at all stages, that such proceedings are judicial in nature, and that an attorney who is the subject of such a proceeding may present constitutional claims directly to the supreme court by petition at any time.* Effective September 14, 1981, N.J. Ct. R. 1:20-4(d)(i) specifically memorializes the procedure by which an aggrieved party may petition the state supreme court for review of constitutional issues in the context of attorney disciplinary proceedings. Finally, on petition for rehearing, the Third Circuit refused to alter its holding even in the face of an affidavit of the Clerk of the Supreme Court of New Jersey indicating that the supreme court

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(Footnote continued from preceding page)

Jersey, "it would be a futile gesture to request the Ethics Committee, which was created by the said Court, or the said Court itself, to declare its own pronouncement to be unconstitutional." (J.A. 26a). Respondents then attempted to invoke the "bad faith", "harassment" or "bias" exceptions to the *Younger* abstention doctrine. *Gibson* v. *Berryhill*, 411 U. S. 564 (1973); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). After conducting an evidentiary hearing on this issue, the district court found no evidence of bad faith, harassment or bias which would satisfy the exception to the *Younger* doctrine (Pet. App. 55a to 58a).

* See *In re Logan*, 70 N. J. 222, 358 A.2d 787 (1976); *Toft* v. *Ketchum*, 18 N. J. 280, 113 A. 2d 671 (1955), *cert.* denied, 350 U. S. 885 (1955); and *Gipson* v. *New Jersey Supreme Court*, 558 F. 2d 701 (3rd Cir. 1977).

on its own motion would imminently consider the constitutional issues raised by plaintiffs (Pet. App. 59a to 61a).*

At this point, however, it is beyond dispute that the predicate for *Younger* abstention exists and has been satisfied. The Supreme Court of New Jersey directly certified the constitutional claims of Lennox Hinds on June 8, 1981 (Pet. App. 62a to 63a), and after full briefing the matter was argued before the court on February 9, 1982. Decision was reserved by the court. Even Respondents concede in their brief at p. 12 that

> [T]he state and federal constitutional challenges to DR1-102(A)(5) and DR7-107(D), on their face and as applied, are now before the New Jersey Supreme Court. Also before the court is the issue whether those rules, properly interpreted, apply to Hinds' comments.

Moreover, Respondents concede that "[i]t is possible that the decision of the New Jersey Supreme Court will afford complete relief" (Brief for Respondents at 49).

Obviously, the predicate for *Younger* abstention which the Third Ciruit erroneously failed to observe is indeed present and has in fact been utilized to full advantage. At this point, then, *Younger* abstention is clearly appropriate. The judgment of the Third Circuit, however, vacated the district court's earlier *Younger* dismissal of the complaint (Pet. App. at 43a-44a). Pursuant to that judg-

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* The state supreme court eventually acted on its own motion to certify these claims because Mr. Hinds had chosen to neither answer the initial charges filed against him nor petition for review of his constitutional challenges by the supreme court.

ment, the district court vacated its previous dismissal on June 22, 1981 (See Appendix to Brief for Petitioner at 3a-4a). Since *Younger* squarely applies to this matter at this point, the Court should vacate the decision of the Third Circuit and remand with directions to dismiss the complaint.*

Although it was equally clear below that the state supreme court was prepared to directly entertain Mr. Hinds' claims, the Third Circuit refused to acknowledge such action and obstinately held that "such actions cannot serve as the basis for vacating our judgments and depriving

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* Implicit in Respondents' argument on the merits, as well as in their recently denied motion to dismiss the writ of certiorari as improvidently granted, is the notion that the Supreme Court of New Jersey's action has somehow rendered this case moot. In fact, the posture of this case has not significantly been altered since certiorari was granted on November 2, 1981. The constitutional issues raised by Mr. Hinds were already pending before the Supreme Court of New Jersey on that date, as was pointed out in the petition for certiorari at p. 10. Only briefing and argument before that court have occurred since.

Clearly, then, the case is not moot. Rather, the predicate for *Younger* abstention (which the Third Circuit thought was lacking) has undisputedly been satisfied. Even if this circumstance is viewed in terms of mootness, the proper disposition of this case must be governed by *U.S.* v. *Munsingwear,* 340 U. S. 36, 39 (1950):

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Co.* v. *Greenwood County,* 299 U. S. 259, 267, to be "the duty of the appellate court" (citations and footnote omitted).

them of their precedential value" (Pet. App. at 35a). Clearly, the Third Circuit was more interested in preserving the "precedential value" of its opinion than in applying the legal principles set forth in *Younger* to the true facts of the case before it.

At all times since the complaint was filed in the district court, the predicate for *Younger* abstention, i.e. the opportunity to raise and have timely decided federal constitutional issues by a competent state tribunal, has been available. (See Point II, *infra*). At this point, even Respondents admit that this predicate is satisfied by the recent proceedings before the Supreme Court of New Jersey. Thus, the judgment of the Third Circuit must be vacated, and this matter remanded to the district court with instructions to dismiss pursuant to *Younger* v. *Harris*.

POINT II

The Third Circuit erred in refusing to invoke *Younger* abstention in deference to a procedure under which an attorney who is the subject of a disciplinary proceeding may petition the State Supreme Court for adjudication of constitutional issues.

Apart from the fact that the Supreme Court of New Jersey has satisfied the predicate for *Younger* abstention by providing a hearing on the constitutional issues tendered by Mr. Hinds, it is clear that the Third Circuit erred by holding that the "opportunity" for such consideration was lacking. Petitioner has argued at length (Brief for Petitioner at 23 to 33) that such an opportunity always existed as a matter of state law and practice. Indeed, the Supreme Court of New Jersey memorialized this practice

in N.J. Ct. R. 1:20-4(d)(i).* Respondents' argument that this procedure is inadequate to satisfy *Younger* lacks merit.

Relying upon *Hernandez* v. *Finley,* 471 F. Supp. 516 (E.D. Ill. 1978), aff'd summarily *sub nom., Quern* v. *Hernandez,* 440 U.S. 952 (1979), Respondents claim that no adequate opportunity exists in New Jersey attorney disciplinary proceedings to submit constitutional issues for adjudication. This argument completely ignores the finding of *Moore* v. *Sims,* 442 U.S. 415, 425-426 (1979) that "abstention is appropriate unless state law clearly bars the interposition of the constitutional claims." No such "clear bar" has been identified by Respondents. Instead, they argue based on *Hernandez* that the procedure of N.J. Ct. R. 1:20-4(d)(i) is insufficient because it is "discretionary" and "interlocutory" in nature.

Hernandez, however, was a challenge to the constitutionality of procedures used by the State to attach the assets of welfare receipients in order to recoup overpayments. The district court found that it was questionable whether a constitutional challenge could be made as part of a motion to quash attachment and that, even if such a challenge were possible, under state law only an interlocutory appeal, not an appeal as of right, was available. 471 F.

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*N.J. Ct. R.1:20-4(d)(i) provides:

> An aggrieved party may file a motion for leave to appeal with the Supreme Court to seek interlocutory review of a constitutional challenge to proceedings pending before the District Ethics Committee or the Disciplinary Review Board. The motion papers shall conform to R.2:8-1. Leave to appeal may be granted only when necessary to prevent irreparable injury. If leave to appeal is granted, the record below may, in the discretion of the Court, be supplemented by the filing of briefs and oral argument.

Supp. at 520. Thus, the district court found the predicate for *Younger* abstention lacking in the case of such welfare recipients because the "*possibility* of *eventual* appeal is no substitute for the right to an immediate appeal challenging plaintiffs' *current deprivation* of property." *Id.* (emphasis by the court). Clearly, the district court found that in the context of welfare recipients who are currently being deprived of their meager assets, *Younger* did not preclude federal judicial relief where great hardship and deprivation would probably be suffered while the welfare recipients were subjected to the vagaries and uncertainty of the state judicial process. Under the circumstances, this Court's summary affirmance of that decision was proper because uncertain state law posed a *de facto* bar to meaningful state court relief.

The instant case is a far cry from *Hernandez* because the State interest in recouping overpayments from welfare recipients by attachment is miniscule compared to the State interest in regulating and disciplining attorneys. While States enjoy broad power to regulate the practice of professions within their boundaries generally,

> [t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'

In re Primus, 436 U.S. 412, 422 (1978), quoting from *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975). See *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 460 (1978). The "especially great" interest in State regu-

lation of lawyers goes to the essence of State sovereignty.* Thus, as noted in *Theard* v. *U.S.*, 354 U.S. 278, 281 (1957), the State judiciary has "autonomous control" over the conduct of lawyers, which control stems from the lawyer's relation to the responsibilities of a court. Accordingly, the comity interest which provides the foundation for *Younger* abstention is far greater in the case of a State's disciplinary system for attorneys than in the case of attachment of a welfare recipient's assets.

Viewed in this context, N.J. Ct. R. 1:20-4(d)(i) satisfies the "opportunity" predicate of *Younger*. Decisions of this Court recognize that it is the burden of the proponent of constitutional claims to avail himself of the opportunity afforded by the State judiciary to adjudicate such claims. Thus, it was Mr. Hinds' burden to "raise"**, "tender"*** or "set up"† the claims he wished to pursue. New Jersey law, as recently memorialized in N.J. Ct. R. 1:20-4(d)(i), indicates the procedure to be followed. Mr. Hinds, however, never tendered such claims, nor did he file an answer to the disciplinary charges brought against him. Mr. Hinds' refusal "to avail [himself] of such opportunities does not mean that the State procedures were inadequate." *Juidice* v. *Vail*, 430 U.S. 327, 337 (1977) (footnote omitted).

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* For example, Article VI, §2, ¶ 3 of the New Jersey Constitution (1947) states:

> The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

** *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (1973).

*** *Trainor* v *Hernandez*, 431 U. S. 343, 440 (1977).

† *Younger* v. *Harris*, 401 U. S. 37, 45 (1971).

Nor does the "discretionary" or "interlocutory" nature of the State procedure render the "opportunity" inadequate in the attorney disciplinary context. Even if the rule provided an absolute immediate "right" to state supreme court review of constitutional issues arising in the course of disciplinary proceedings, the burden would still be on Mr. Hinds to affirmatively act to present such issues to the court. The fact that immediate review in New Jersey is "discretionary" or "interlocutory" does not alter Mr. Hinds' burden one iota; he must still take the initiative to file relevant documents and legal argument for the supreme court's consideration. The only distinction is that in the latter case, the court reserves the right to deny review.*

Recognizing the State's "especially great interest" in attorney disciplinary matters, and in light of an attorney's presumably above-average education and familiarity with judicial procedures, it can hardly be deemed burdensome to require an attorney who is the subject of a disciplinary proceeding to first seek state court review of constitutional claims within that proceeding pursuant to N.J. Ct. R.1:20-4(d)(i). If the state court entertains the requested review, all of the policies underlying *Younger* are served; if it declines, the attorney has suffered no interim ir-

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* As a practical matter, this distinction is lessened considerably when one considers that even in cases where review lies as of "right," courts may decline to review an issue by finding a lack of jurisdiction, inadequate development of the record (i.e. ripeness), failure to exhaust various remedies, etc.

reparable harm in the typical case.* Under the unique circumstances presented here, therefore, Mr. Hinds at all times had an adequate opportunity to present his claims to the state supreme court, but failed to do so. The New Jersey procedure clearly satisfies the *Younger* predicate.**

Finally, Respondents contend that the decision in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980) somehow supports their position. That case analyzed the different roles played by a State's highest court in order to determine whether the Supreme Court of Virginia was immune from suit for declaratory and injunctive relief, as well as an award of attorneys' fees. The Virginia court was held immune respecting its legislative rule-making activities, but not respecting its enforcement activities initiated under the authority of state law by the court itself.

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* Mr. Hinds has at no time demonstrated that he will be irreparably harmed if he is required to assert his federal claims before the Supreme Court of New Jersey. To the contrary, Respondents' brief points out that "It is possible that the decision of the New Jersey Supreme Court will afford complete relief." (Brief for Respondents at 49). The only possible harm resulting from institution of disciplinary proceedings against Mr. Hinds was self-created. Although New Jersey disciplinary proceedings are normally carried out on a private, confidential basis, it was Mr. Hinds himself who publicized the initial communication received by him from the ethics committee by distributing it to the news media.

** If interlocutory review is not granted, the constitutional claims properly raised and preserved by an attorney in his answer will be adjudicated by the Supreme Court of New Jersey when it considers the merits of the disciplinary action. N.J. Ct. R.1:20-4 (d)(ii); see also N.J. Ct. R.1:20-2(j).

By contrast, the instant case involves not the immunity of the Supreme Court of New Jersey from suit in federal court, but the issue of whether the supreme court's adjudication of constitutional issues in the context of an attorney disciplinary proceeding is entitled to deference under *Younger*. Whether or not the supreme court would be entitled to immunity in the *Consumers Union* situation has no relation to the issue of *Younger's* applicability here.*

In sum, New Jersey's procedures provide an adequate opportunity for federal constitutional claims to be tendered and decided. In fact, the Supreme Court of New Jersey has *sua sponte* entertained Mr. Hinds' claims despite his refusal to tender them. Accordingly, the *Younger* doctrine is applicable to this case, and the Third Circuit erred by reversing the district court's dismissal.

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* It is interesting to note, however, that in *Consumers Union* the Supreme Court of Virginia argued that it was not a "person" under 42 U.S.C. §1983, but this Court found that prospective relief was nonetheless proper because the Chief Justice of Virginia was a named defendant in his official capacity. 446 U. S. at 737 n. 10. Here, the only defendant is the "Middlesex County Ethics Committee, an agency established by the Supreme Court of New Jersey." The Ethics Committee, as a State agency, is clearly not a "person" under §1983. *U.S. ex rel Gittlemacker* v. *County of Philadelphia*, 413 F. 2d 84, 86 n.2 (3rd. Cir. 1969), *cert.* denied, 396 U. S. 1046 (1970); *Thompson* v. *Burke*, 556 F. 2d 231, 232 (3rd Cir. 1977).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit should be reversed and this matter should be remanded with directions to dismiss the complaint pursuant to the *Younger* abstention doctrine.

Respectfully submitted,

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Dated: March 11, 1982.

Motion to Dismiss or Affirm

NO. 81-460

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IN THE

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OCTOBER TERM, 1981

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Respondents.

MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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IN THE

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vs.

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Respondents.

MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

Respondents respectfully move that the Court dismiss as improvidently granted the writ of certiorari granted in this matter on November 2, 1981.

In support of this motion, respondents rely on their brief on the merits heretofore submitted, and particularly Point IV thereof.

Respondents further respectfully call to the attention of the Court that, as predicted in respondents' brief at

page 11, the disciplinary proceeding in the Lennox Hinds matter was argued before the Supreme Court of New Jersey on February 9, 1982. Decision was reserved.

Dated: February 10, 1982.

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Petitioner,

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GARDEN STATE BAR ASSOCIATION, et al.,

Respondents.

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION

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No. 81-460

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MIDDLESEX COUNTY ETHICS COMMITTEE, an agency established by the Supreme Court of New Jersey,

Petitioner,

-v-

GARDEN STATE BAR ASSOCIATION and THE NEW JERSEY ASSOCIATION OF BLACK WOMEN LAWYERS, both corporations organized under the laws of the State of New Jersey; NATIONAL CONFERENCE OF BLACK LAWYERS, a corporation organized under the laws of the District of Columbia; and LENNOX HINES,

Respondents.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union respectfully moves for leave to file the attached brief amicus curiae. The consent of the attorney for the respondent has been obtained, but petitioner's attorney

has refused consent.

The ACLU is a nationwide, non-partisan organization of over 250,000 members. It was founded over sixty years ago to preserve and protect the fundamental principles of the Bill of Rights. In defense of those principles, the ACLU has appeared in this Court both in cases where the substantive rights guaranteed by the Constitution have been infringed, and in cases where procedural avenues of relief created by Congress are threatened.

The ACLU's interest in this case stems from both substantive and procedural concerns. Substantively, amicus believes that the very attempt to apply disciplinary rules to speech,as clearly protected as was the speech of respondent Lennox Hinds in this case,constituted an attempt to deter the exercise of vital First Amendment rights to vigorously speak out on matters of public

concern. In its present posture, however, the case presents the critical procedural question as to whether federal courts will be foreclosed from promptly remedying such ongoing First Amendment violations by a radical extension of comity doctrines to circumstances where they have never been applied.

Amicus will show that state procedures offered no assurance that any forum, much less a judicial forum, was available to adjudicate respondent's constitutional claims. We will also suggest that certiorari should be dismissed as improvidently granted in light of subsequent factual developments. Because the judgment below did not bar the state from proceeding to grant Mr. Hinds relief, and because it appears that the New Jersey Supreme Court will have fully adjudicated his claims prior to this Court's decision, the seeming

conflict between state and federal proceedings which certiorari was granted to address has been effectively resolved.

To present our views to the Court in this important First Amendment case, the ACLU moves for leave to file the attached brief amicus curiae.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* appears in the foregoing motion.

STATEMENT OF THE CASE

On January 20, 1977, Mr. Lennox Hinds, then serving as the National Director of the National Conference of Black Lawyers ("NCBL"), participated in a press conference that was held in New Brunswick, New Jersey. The press conference was organized around the trial of Joanne Chesimard, a black woman, who, at the time, was being tried for the murder of a white police officer.

Mr. Hinds participated in the press conference solely as the chief spokesperson for the NCBL. As the court records of the Chesimard trial showed, Mr. Hinds was not an attorney of record in the case.

(Pet. at 4a)[1/] Newspaper accounts that followed the press conference reported Mr. Hinds as having expressed the view that the Chesimard trial was affected by racism. He was further reported as having been "highly critical of the trial judge's judicial temperament and racial sensitivity." (Pet. at 3a)

Mr. Hinds maintained a law office in Middlesex County, New Jersey. Shortly after reports of Mr. Hinds' views appeared in the newspapers, the matter of his public remarks was called to the attention of the local ethics committee, the Middlesex County Ethics Committee ("the committee"),

1/ "Pet." refers to the certiorari petition filed in the instant case. It contains, in its appendices, the opinions of the Court of Appeals and the District Court below. References to the lower court opinions are to the pagination as it appears in the appendices to the certiorari petition.

which was generally authorized to investigate the ethical conduct of local attorneys.

In February 1977, the committee asked one of its members, David M. Foley, to investigate the matter. Some ten months later, in December 1977, Mr. Foley concluded his investigation and submitted a report to the committee in which he recommended that disciplinary charges be filed against Mr. Hinds, for having violated DR 1-102 (A)(5) and DR 7-107(D) of the Code of Professional Responsibility.[2/] The local committee adopted Mr. Foley's recommendation and prepared and, on January 3, 1978, served such charges upon Mr. Hinds.

2/ DR 1-102(A)(5) provides:
"A lawyer shall not.... Engage in conduct that is prejudicial to the administration of justice."

DR 7-107(D) provides:
"During the selection of a jury or the trial of a criminal matter, a lawyer
(fn. cont. on next page)

The charges were based entirely upon the public statements that Mr. Hinds had made about the conduct of the Chesimard trial, a trial that had received widespread public attention and was the subject of much public interest and controversy. Mr. Hinds believed that the disciplinary charges were being pursued in derogation of his First Amendment right to comment about matters of significant public interest and concern. He further believed that the disciplinary

(fn. cont. from preceding page)

> or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that he expects to be disseminated by means of public communication and that relates to the trial parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial...."

matter was being pursued to deter him from speaking out, in the future, about inequities within the legal system. (Comp. at paras. 21, 22, and 25)[3] Other black attorneys in New Jersey, also believed that the effort to impose disciplinary sanctions upon Mr. Hinds was having a "chilling effect" not only upon him but upon themselves as well, deterring them from engaging in public statements about the legal system. (Comp. at paras. 22, 25 and 28)

The local ethics committee was not empowered to adjudicate these First Amendment claims.[4] Therefore, instead of

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3/ "Comp." refers to the Verified Complaint filed in the District Court and part of the record in this case.

4/ The incapacity of the ethics committee to adjudicate Mr. Hinds' First Amendment claims is discussed below in Point I.

responding to the disciplinary charges that were advanced against him and instead of appearing before a panel of the local committee, Mr. Hinds initiated an action under 42 U.S.C. 1983 in federal District Court, seeking the prompt vindication of his constitutional interests. The federal suit was filed on February 10, 1978, not only on behalf of Mr. Hinds but also on behalf of the three organizations composed of black attorneys, the Garden State Bar Association, the New Jersey Association of Black Women Lawyers and the National Conference of Black Lawyers.

In essence, Mr. Hinds contended that the application of the two disciplinary rules to his public statements and the attempt to impose disciplinary sanctions for those statements violated the First Amendment. He further alleged that the local ethics committee proceedings were

subjecting him to "public scorn, censure and ridicule" simply because he had exercised his First Amendment right to comment upon matters of public interest. (Comp. at para. 28(b))

Plaintiffs sought equitable and declaratory relief to the end of enjoining the disciplinary proceeding that was then being pursued and declaring unconstitutional the disciplinary rules, 1-102(A)(5) and 7-107(d), as they were being applied to his First Amendment activity.

In the spring of 1978, cross-motions were advanced in federal District Court, the plaintiffs seeking á preliminary injunction and the defendant moving to dismiss the complaint. During the pendency of these motions the local ethics committee voluntarily suspended its proceedings against Mr. Hinds. On June 6, 1978, the

District Court, invoking the doctrine of comity, granted defendants' motion to dismiss the federal complaint.

An appeal was taken to the Court of Appeals for the Third Circuit, which on February 24, 1980, reversed the judgment of the District Court. It concluded that the District Court's invocation of comity principles was improper, noting that the disciplinary proceedings, before the local ethics committee, did not afford a fair opportunity for the expeditious adjudication of Mr. Hinds' First Amendment claims.

On May 12, 1981, the state filed a petition for rehearing with the Court of Appeals. Its petition included an affidavit submitted by the clerk of the New Jersey Supreme Court. The affidavit indicated that the Supreme Court was now disposed to entertain Mr. Hinds' constitutional claim, and that Mr. Hinds, therefore, could no

no longer assert that the state forum did not provide him with an opportunity to press his First Amendment position. The Court of Appeals denied the petition, largely, upon the conclusion that there was "inadequate reason to believe that Hinds could have obtained New Jersey Supreme Court consideration of his constitutional claim when he initiated the federal action." (Pet. at 37a) However, the Court of Appeals ruling also expressly noted that its decision posed no impediment to the initiation of proceedings in the New Jersey Supreme Court to adjudicate Mr. Hinds' First Amendment claims. (Pet. at 37a)

On June 3, 1981, the New Jersey Supreme Court, sua sponte, certified to

itself the local committee complaint that was then pending against Mr. Hinds and, in so doing, it agreed to entertain Mr. Hinds' constitutional challenges to DR 1-102 and DR 7-107(D).[5/]

On September 5, 1981, a petition for a writ of certiorari was filed with this Court and certiorari was granted on November 2. One week later, on November 9, 1981, the New Jersey Supreme Court directed

5/ The Court took two further actions. It amended the General Rules Governing the Courts of New Jersey, effective September 14, 1981, to expressly provide that all constitutional issues raised in the context of a disciplinary proceeding would be heard exclusively by the Supreme Court. (R 1:20-2(j)) And it promulgated another new rule providing that a motion could be made to the Supreme Court for leave to submit constitutional issues to the court on an interlocutory basis. (R. 1:20-4(d))

the filing of briefs regarding the "constitutional challenges to DR 1-102 and DR 7-107(D)." These briefs have been filed and oral argument, regarding these issues, has been set for February 9, 1982.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Monroe v. Pape, 365 U.S. 167 (1961) this Court discussed the importance of the Civil Rights Act of 1871. The Court noted that the 1871 Act was necessary "to provide a federal remedy, where the state remedy though adequate in theory was not available in practice." Id. at 174.

Statements by members of the Congress that enacted the 1871 Civil Rights Act amply reconfirm the conclusion that the 1871 statute was necessary because state and local courts in the South were not adequately protecting basic civil rights and interests. This concern was passionately expressed by Congressman Staughton who, addressing the Forty-Second Congress, noted that

> The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed, which renders the

> worst Government on the face of the earth respectable by way of comparison. There is no security for life, person or property. The State authorities and local courts are unable or unwilling to check the evil or punish the criminals.[6/]

Conditions in the South and the quality of southern justice have thankfully improved since 1871. Nevertheless, that improvement has, in no small way, been prodded by the accessibility of the federal courts to persons seeking to vindicate their civil and constitutional rights. See e.g., Kluger, Simple Justice (1975); Friedman (ed.) Southern Justice (1965). Even

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6/ Cong. Globe, 42nd Cong., 1st Sess. 321. For a collection of other contemporaneous remarks by members of the Forty-Second Congress, explaining the need for the enactment of the 1871 Civil Rights Act, see pp. 34-39 of the Brief On Behalf of the NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae, filed this term in the case of Patsy v. Board of Regents, No. 80-1874. See also Brief for the Petitioner in Patsy at 31-38.

assuming, as we do, that most state courts are, at present, fully capable of protecting fundamental constitutional freedoms, both the original enactment of the 1871 Act as well as continued legislative retention of its salutary provisions reflect a consistent congressional desire to assure to civil rights litigants the option of prompt adjudication of federal constitutional claims in federal courts.[7/]

The doctrine of comity stands counterpoised to this unequivocal congressional desire. Comity is a doctrine that counsels against federal court interference with "pending" state court actions. Perez v. Ledesma, 401 U.S. 82, 103 (1971). As articulated in Younger v. Harris, 401 U.S.

7/ See generally, Brief for the Petitioner, Patsy v. Board of Regents, supra n. 6, at 28-58.

37 (1971), the doctrine rests upon two sets of considerations. The first involves the notion that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law...." Id. at 43. The second involves the recognition that federal courts must evince "sensitivity to the legitimate interests of both State and National Governments, and [that]the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Id. at 44.

Given the amorphous[8] considerations upon

8/ The suggestion that federal courts "not unduly interfere with the legitimate activities of the States" is especially general and untethered. For example, the operation of a state's educational system, or a state electoral system, or the administrative regulation of prisons or attorneys are clearly "legitimate activities of the State." No one seriously suggests, however, that in light of comity principles cases such as Brown v. Board of Education, 347 U.S. 483 (1954); Dunn v. Blumstein, 405 U.S. 330 (1972); Johnson v. Avery, 393 U.S. 483 (1969) and Bates v. State Bar of Arizona, 433 U.S. 350 (1977) were wrongly decided.

Because the general proscription against undue interference with "the legitimate activities of the State" is obviously unmanageably broad, and in constant conflict with the revolution in federalism effected by the post-Civil War amendments (See, Hyman A More Perfect Union (1973), this Court has found it necessary to cabin comity principles. As discussed below, the Court has typically limited federal abstention on grounds of comity to those instances where there existed a suit "pending" in state court and where the pending state court action provided a fair and expeditious opportunity for the adjudication of federal constitutional claims. See Gibson v. Berryhill, 411 U.S. 564, 577 (1973). Other specific exceptions to Younger abstention have also been recognized. See generally, discussion at Points I and II below.

which the doctrine of comity rests, the precise contours and the specific application of the doctrine have not been easily delineated. Moreover, efforts to apply comity principles are compounded by the essential tension, suggested above, between those principles, on the one hand, and the congressional mandate,originally set forth in the 1871 Civil Rights Act and now embodied in 42 U.S.C. 1983, to provide a federal forum for the prompt adjudication of constitutional claims.

It might thus appear that this case would once again cause this Court to confront the essential tension between "two somewhat...conflicting lines of authority" (Fair v. McNary, ___U.S.___, 50 U.S.L.W. 4017 (December 1, 1981) namely, the congressional mandate commanding accessibility to federal courts and the judicial disinclination to interfere in pending

state court proceedings.

However, careful scrutiny of the factual ingredients to this controversy reveals that no such conflict exists. For this is not a case where a federal court was asked to defer to a state judicial forum that was fully capable of adjudicating the federal litigant's constitutional claims. Rather, under the facts of this case, the issue here is whether the clear congressional desire to provide for the expeditious adjudication of constitutional rights should be ignored and comity principles invoked, where state administrative proceedings plainly provide no expeditious opportunity to adjudicate federal constitutional claims.

Accordingly, the burden of this amicus brief is to demonstrate that, at the point in time that respondent Hinds sought federal judicial relief, New Jersey's administrative proceedings provided

Mr. Hinds with no fair and expeditious opportunity to have his constitutional claims heard by a competent state tribunal. The local ethics committee, before which the Hinds matter was pending, had neither the authority nor the competence to entertain or adjudicate Mr. Hinds' constitutional claims. And New Jersey rules provided no mechanism assuring Mr. Hinds that he could present his constitutional claims to the New Jersey Supreme Court and have such claims adjudicated. These matters are the focus of Point I below.

In Point II, amicus argues that the error committed by the federal District Court, when it dismissed the Hinds complaint, has not been cured by the subsequent amendment of New Jersey's Disciplinary Rules or by the subsequent decision of the New Jersey Supreme Court to entertain Mr. Hinds' constitutional claims.

In Point III amicus suggests that the petition for certiorari should be dismissed as having been improvidently granted. Amicus again emphasizes that the District Court's error has not been cured by the irregular but welcomed decision of the New Jersey Supreme Court to now entertain the constitutional issues first raised by Mr. Hinds in federal court. Nevertheless, it notes that the likelihood that the New Jersey court will have decided the merits of the underlying First Amendment controversy before this Court decides the case at bar counsels against the improvident expenditure of this Court's judicial resources.[9/]

9/ In addition to advancing these arguments, amicus also expressly supports each of the arguments propounded by Respondents. Thus, we agree with the position taken in Point III of Respondents' Brief, that the instant organizational plaintiffs were never parties in the state ethics proceedings, and could not, therefore, have been barred from federal court under comity principles. See Steffel v. Thompson 415 U.S. 452 (1974).

ARGUMENT

I. NEW JERSEY'S ATTORNEY DISCIPLINARY PROCEDURES PROVIDED MR. HINDS WITH NO FAIR AND EXPEDITIOUS OPPORTUNITY TO HAVE HIS CONSTITUTIONAL CLAIMS ADJUDICATED BY A COMPETENT STATE TRIBUNAL.

Before a federal court can dismiss the constitutional claim of a litigant on the basis of the comity doctrine, it must be satisfied,at least, that a pending state court proceeding provides a fair and expeditious opportunity for the adjudication of the constitutional claim.[10/]

In Gibson v. Berryhill, 411 U.S. 564, 577 (1973), this Court noted that the invocation of the comity doctrine by a federal court "naturally presupposes the opportunity to raise and have timely

10/ We do not suggest that a fair and expeditious opportunity to raise a federal constitutional claim in a state judicial proceeding is a sufficient condition for the exercise of Younger abstention in civil cases, only that it is a necessary condition.

decided by a competent state tribunal the federal issues involved." Similarly, in Kugler v. Helfant, 421 U.S. 117, 124 (1975) the Court observed that the principles articulated in Younger and its progeny were "founded on the premise that ordinarily a pending state prosecution provides the accused [with] a fair and sufficient opportunity for the vindication of federal constitutional rights." Accord, Trainor v. Hernandez, 431 U.S. 434 (1977).

Indeed, petitioner does not seriously dispute this legal proposition. See, e.g., Brief for Petitioner at 22. Thus, the instant controversy turns upon whether the procedures which were available to Mr. Hinds, under New Jersey's disciplinary mechanism, created a fair opportunity for the expeditious adjudication of his constitutional claims. The Court of Appeals for the Third Circuit

concluded, and amicus agrees, that no such fair opportunity existed.

In reaching its conclusion, the Court of Appeals surveyed New Jersey's disciplinary procedures. (Pet. at 6a-9a) It noted that, at the time that Mr. Hinds sought federal judicial relief,[11] his disciplinary matter was lodged at the lowest administrative level within New Jersey's three-tiered

11/ In Perez v. Ledesma, 401 U.S. 103 (1971), this Court observed that in deciding whether a state prosecution was "pending" for purposes of deciding whether federal abstention was appropriate, the inquiry should focus upon the situation in the state forum at the time of the federal hearing at which equitable relief is sought, rather than at the point in time when the federal suit was commenced. Id. at 103.

This distinction is unimportant for purposes of the present case. For Mr. Hinds' disciplinary matter was lodged at the lowest administrative level of the state processes, when the federal suit was filed in February, 1978, when the parties submitted cross-motions in the Spring of 1978, and when the District Court decided to dismiss the federal complaint in June 1978.

disciplinary process. (Pet. at 7a) The matter resided with the local ethics committee whose authority was generally limited to preliminary factual investigations and recommendations and,with regard to serious matters, submitting a formal accusatory instrument to the state review board. In this regard, the Court of Appeals found, quite correctly, that this local ethics committee was neither competent nor authorized to entertain Mr. Hinds' constitutional claims.

This finding rested upon several observations. First, the Court noted that, under general principles of administrative law, it is rare, indeed, for low level administrators to pass upon the constitutionality of the law or rules that they are charged with administering. See Weinberger v. Salfi; 422 U.S. 749 (1975); Cf. McNeese

v. Board of Education, 373 U.S. 668 (1963).

This observation was reinforced, in the present situation, by the fact that the local ethics committee was composed of both lawyers and non-lawyers. In this respect, the Court below noted that "[n]o court in this country has heretofore been willing to accept constitutional rulings by non-lawyers." (Pet. at 13a)

Finally, the Court pointed out that although New Jersey's rules regarding disciplinary procedures are quite elaborate and detailed, "[t]here is no provision in any of the rules for a legal or constitutional determination at the Ethics Committee stage." (Pet. at 13a) This combination of factors caused the Court to conclude that the procedures before the local ethics committee were "designed to elicit facts, not legal arguments." (Pet. at 13a)

Indeed, in its brief to this Court, petitioner does not seriously argue that the local ethics committees were conferred with the competence and the authority to pass upon constitutional claims. Rather, the thrust of its argument is that Mr. Hinds had a fair opportunity to have his constitutional claims considered by a judicial tribunal, because he could have advanced an interlocutory application to the New Jersey Supreme Court in an effort to raise his constitutional objections to the disciplinary proceeding. Petitioner recognizes, as it must, that prior to September 1981, New Jersey's disciplinary rules contained no provision permitting the subject of a disciplinary complaint to seek expeditious and interlocutory review of his or her constitutional claims. Nevertheless, citing the case of In re Logan, 70 N.J. 222, 358 A.

2d 787 (1976) petitioner contends that the New Jersey Supreme Court's "control over its ethics committees includes the power to entertain constitutional or other issues by way of motion at any time during the course of a disciplinary proceeding." (Brief for Petitioner at 24-25)

Petitioners' reliance on the Logan case is misplaced for several reasons.[12/]

First, it is not even clear that Logan stands for the proposition for which it is invoked, namely, that the subject of a disciplinary proceeding has the right to press a constitutional claim before the Supreme Court "at any time." Logan did

12/ Petitioners incorrectly cite three other cases for the proposition that Mr. Hinds could have expeditiously proceeded to the New Jersey Supreme Court for the adjudication of his constitutional claims. Two of the cases cited (In the

(fn. cont. on next page)

involve an effort by the subject of a disciplinary proceeding to raise, in the state Supreme Court, constitutional objections to the proceeding. The Logan opinion is unclear as to the point in time that the attorney first submitted his motion to the

(fn. cont. from preceding page) Matter of the Application of Philip J. LiVolsi, 85 N.J. 576, 428 A. 2d 1268 (1981) and American Trial Lawyers v. N.J. Supreme Court, 66 N.J. 258, 330 A. 2d 350 (1974) involve litigants filing independent lawsuits within the New Jersey state court system. The third case (In re NBC, 66 N.J. 258, 330 A. 2d 350 (1974) involves a direct petition to the New Jersey Supreme Court sitting in its rulemaking or legislative capacity. In any event, in relying upon these three cases, petitioner is urging not that constitutional claims must be presented in ongoing state judicial proceedings, but that Mr. Hinds must avail himself of state judicial remedies by initiating a state lawsuit himself before seeking federal judicial relief. It is, of course, well settled that a potential civil rights litigant need not exhaust state judicial remedies before proceeding to federal court. Monroe v. Pape, supra; McNeese v. Board of Education, supra. See generally Brief for Petitioner, Patsy v. Board of Regents, supra, at 14-27.

New Jersey Supreme Court. It does appear, however, that Mr. Logan's motions, though involving matters that occurred very early in the disciplinary process, were not adjudicated by the New Jersey Supreme Court until the entire disciplinary matter wended its way through New Jersey's elaborate administrative processes. Thus, hearings were held before the local ethics committee on January 29, 1974. The constitutional challenges to various aspects of those hearings were not adjudicated by the Supreme Court until May, 1976. Such a delay of nearly two and a half years does not support the claim that, under Logan, the subject of a disciplinary hearing could have secured expeditious judicial resolution of his or her constitutional claims "at any time."

Second, even if the 1976 Logan decision recognized a right to submit an interlocutory application to the Supreme

Court, it is not clear that such a right survived the subsequent recodification of New Jersey's disciplinary procedures in 1978. As the New Jersey Supreme Court has recently shown, when the court wishes to promulgate a rule permitting an interlocutory motion to raise constitutional issues, it is very capable of drafting such a rule. The fact that no such express rule was drafted in 1978 invites either of two fairly obvious inferences. Either the rule which petitioner contends was recognized in the Logan case was not firmly established. Or such a rule permitting interlocutory applications existed in 1976, but was discarded in 1978, when the Supreme Court engaged in the substantial recodification of its disciplinary procedures.

Finally, and perhaps most importantly, even if the Logan case could be said to recognize the right to seek an interlocutory

decision on constitutional issues from the New Jersey Supreme Court, there is nothing in the Logan case,or even in the new rule (R. 1:20-4(d)(i)) promulgated in 1981 by the Supreme Court,requiring the court to entertain such constitutional questions. Indeed, the new rule leaves the Supreme Court with enormous discretion as to whether to hear the constitutional question on the merits. The new rule states that "leave to appeal may be granted only when necessary to prevent irreparable injury." (R. 1:20-4(d)(i)).[13/] Thus, even if in 1978, New Jersey's practice was to permit interlocutory motions to be made, requesting Supreme Court adjudication of constitutional issues, it is plain that the

13/ Although the new rule is phrased in terms of "appeal," the interlocutory procedure is, in fact, not an "appeal" at all, since the Ethics Committee is not authorized to address the constitutional questions in the first instance.

granting of such motions was discretionary with the Supreme Court.

As noted above, in Gibson v. Berryhill, and again in Trainor v. Hernandez, this Court recognized that before a federal litigant's civil rights claim can be dismissed on the basis of the comity doctrine, the federal district court must be assured that a fair and expeditious constitutional adjudication will take place in the pending state judicial forum. The discretionary nature of the New Jersey Supreme Court's authority to entertain interlocutory constitutional questions plainly provides no assurance of expeditious constitutional adjudication. Cf. McNeese v. Board of Education, supra.

In sum, the June, 1978 decision of the District Court to dismiss Mr. Hinds' federal

complaint on the basis of Younger v. Harris was plainly error. The District Court could not have been satisfied that a pending state court proceeding assured a fair and expeditious forum for the adjudication of Mr. Hinds' constitutional claims. There was nothing in New Jersey's rules or regulations or practice even remotely suggesting that such an adjudication was assured.

II. THE ERROR COMMITTED BY THE DISTRICT COURT WHEN, PURSUANT TO COMITY PRINCIPLES, IT DISMISSED MR. HINDS' FEDERAL COMPLAINT HAS NOT BEEN CURED BY THE SUBSEQUENT AMENDMENT OF NEW JERSEY'S DISCIPLINARY RULES OR BY THE SUBSEQUENT DECISION OF THE NEW JERSEY SUPREME COURT TO ENTERTAIN MR. HINDS' CONSTITUTIONAL CLAIMS.

As discussed above, when Mr. Hinds sought to assert his federal constitutional claims in federal court, the disciplinary proceeding then pending before the local ethics committee provided no fair and expeditious opportunity for the adjudication of constitutional issues. Moreover, as we have also shown, under the rules and practice that existed in New Jersey in 1978, there was no mechanism to assure that Mr. Hinds could have had his First Amendment claims promptly adjudicated by the New Jersey Supreme Court. Viewing the propriety of abstention as of that time, as is required

by Perez v. Ledesma, supra, the invocation of comity was plainly inappropriate.

In September 1981, the New Jersey Supreme Court amended its disciplinary rules to expressly permit the subject of a disciplinary proceeding to submit a motion to the New Jersey Supreme Court, requesting an interlocutory adjudication of constitutional issues. (R. 1:20-4(d)(i)) The new rule, however, confers enormous discretion upon the Supreme Court to grant or deny such a motion. Thus, even if the question before this Court were not whether the District Court erred in requiring abstention, but rather whether abstention is required under the present state of New Jersey law, the subject of a disciplinary proceeding is not assured under the new rule of a prompt adjudication of his or her constitutional claims. In this respect,

as discussed above, even New Jersey's new rule does not provide the assurances of a state judicial forum for constitutional adjudication that this Court indicated was a necessary precondition to the invocation of the comity doctrine. See Gibson v. Berryhill, supra; Trainor v. Hernandez, supra.

But, the instant case is further complicated by new factual developments that have taken place within the past few months. In June 1981, the New Jersey Supreme Court decided, sua sponte, to entertain the constitutional issues raised by Mr. Hinds. We are informed that briefs, which focus on the merits of the constitutional issues, were filed in the New Jersey Supreme Court and that oral argument on these constitutional questions

has been set for February 9, 1982.

The question arises as to whether these new events alter the analysis set forth in Point I. It is the position of amicus that the error committed by the District Court has not been cured by the subsequent decision of the New Jersey Supreme Court to entertain Mr. Hinds' constitutional claims. The only argument that can be advanced to the contrary, would look to this Court's decision in Hicks v. Miranda, 422 U.S. 332 (1975) and would drastically extend the Hicks rule beyond the facts of that case.

In Hicks v. Miranda, supra, state criminal prosecutions were initiated against federal plaintiffs shortly after the federal complaint was filed but before substantial proceedings had taken place in the federal court. In such a situation this Court suggested that comity principles should not be dictated, exclusively, by a race to the

courthouse and the Court held that federal deference to the state criminal proceedings was appropriate. See also Doran v. Salem Inn, Inc. 422 U.S. 922 (1975). The Hicks rule is inapposite to the instant case for several reasons.

First, Hicks is both quantitatively and qualitatively different from the case at bar. In Hicks, as well as in Doran, state criminal proceedings were initiated only one day after the federal law suits were commenced. In those cases, federal plaintiffs were, therefore, provided with state judicial tribunals, for the adjudication of their constitutional claims, within one day of their efforts to raise constitutional issues in federal court. In the present case, Mr. Hinds is finally to be accorded his day in state court some four years after he sought relief from the federal court.

Moreover, neither in Hicks nor in Doran was there any suggestion that the state action was brought to oust the federal court of jurisdiction, or as a response to the pending federal action. To the contrary, it was apparent in both cases that the state court action had been long-planned and that the federal court action might interfere with the state court proceedings. Such is not the case here. From 1978 until the past few months there was simply no adjudication taking place in a New Jersey state court, with which the assertion of federal equitable relief might be said to interfere.

Yet another reason why the rule in Hicks should not apply to the instant case involves the nature of the competing state court proceedings in this case as distinct from Hicks. The Hicks rule applied when a state criminal proceeding had been initiated

shortly after the commencement of the federal litigation. Here the state proceeding is not criminal in nature. Plainly, the disinclination to interfere in state criminal proceedings lies at the heart of the comity doctrine. The balance between comity principles and the interest in providing a federal forum for the expeditious adjudication of constitutional issues should obviously be struck differently here, where there is clearly no danger of interfering with a state criminal proceeding.

Finally, the application of the Hicks rule to the instant situation would cause enormous judicial inefficiency and uncertainty. Its extension to this case would effectively permit state officials to divest a federal court of its jurisdiction over a §1983 case simply by moving to dismiss on invalid Younger grounds,continuing to litigate the Younger issue, and then--

years later--placing before a state court the substantive issues that were initially raised in federal court. Were this Court to sanction such a practice, by extending the Hicks rule to this case, it would transform the comity doctrine--which rested to a significant degree on a desire to avoid duplicative litigation--into a doctrine that generates precisely such duplication. It would invite, as well, unseemly friction, time wasted on collateral procedural issues, and delay in resolving important constitutional claims.

III. THE RECENT DECISION OF THE NEW JERSEY SUPREME COURT TO ADJUDICATE THE FIRST AMENDMENT ISSUES INITIALLY RAISED BY MR. HINDS IN THE DISTRICT COURT, SUGGESTS THAT CERTIORARI WAS IMPROVIDENTLY GRANTED.

One week after this Court's acceptance of certiorari review in this case, the New Jersey Supreme Court directed the filing of briefs regarding the First Amendment implications of applying disciplinary rules DR 1-102(A)(5) and DR 7-107(D) to Mr. Hinds' public statements concerning the Chesimard trial. We are further informed that oral argument before the New Jersey Supreme Court has been set for early February. Thus, the constitutional questions that Mr. Hinds first sought to raise in 1978 are, at long last, before a court for imminent disposition on the merits.

In Point II above, we assert that this belated but welcomed decision,

to adjudicate Mr. Hinds' constitutional claims, does not cure the error committed by the District Court when, in June 1978, it dismissed Mr. Hinds' federal complaint. However, the New Jersey court's imminent examination of the constitutional issues does suggest that the instant writ should appropriately be dismissed upon the grounds that certiorari was improvidently granted.

If oral argument before the New Jersey Supreme Court proceeds as scheduled, that court is likely to decide the merits of Mr. Hinds' constitutional claims before this Court has an opportunity to render its decision in the case at bar. It is also very possible that the New Jersey court will rule that the two disciplinary rules should not have been applied to Mr. Hinds' conduct and that their

application to Mr. Hinds public comments violated the First Amendment. See, e.g., In Re Education Law Center, 86 N.J. 124 (1981); State v. Schmid, 84 N.J. 535 (1980), cert. dismissed as improvidently granted, ___U.S.L.W.___ (January 12, 1982). Such a ruling would almost certainly obviate Mr. Hinds' need for further federal judicial relief and therefore moot his federal claims.

Given the strong possibility that the New Jersey Supreme Court's decision is likely to put to rest the underlying controversy that gave rise to the instant lawsuit, it would not seem to "be a provident expenditure of the energies of [this] Court" (Triangle Improvement Council v. Ritchie, 402 U.S. 497, 502 (1971) (Justice Harlan, concurring)) to further pursue the instant matter, at this juncture. The intervening decision of the New Jersey

Supreme Court to address Mr. Hinds' constitution claims provides an appropriate occasion for this Court to dismiss the instant petition as having been improvidently granted. See Picirillo v. New York, 400 U.S. 548 (1971); Triangle Improvement Council v. Ritchie, supra; Sanks v. Georgia, 401 U.S. 144 (1971). In the alternative the Court might postpone plenary consideration of this case until after the New Jersey Supreme Court renders its decision. Such an option will enable this Court to render a more informed judgment as to whether, by virtue of the New Jersey Supreme Court decision, this case has become moot or whether further adjudication by this Court is either necessary or appropriate.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed. In the alternative, the writ should be dismissed as improvidently granted, or oral argument deferred until the New Jersey Supreme Court has rendered its decision in the Hinds matter.

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Amicus Brief

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MOTION FILED
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No. 81-460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MIDDLESEX COUNTY ETHICS COMMITTEE,

Petitioner,

v.

GARDEN STATE BAR ASSOCIATION, *et al.*

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE PUERTO RICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION

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Amici, by their undersigned counsel, move the Court for leave to file the attached brief amici curiae in support of the respondents. Respondents have con-

sented to its filing but petitioner has refused consent, thus necessitating this motion. The motion also discloses the interest of amici.

1. The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation, incorporated under the laws of the State of New York to assist Blacks in securing their constitutional civil rights by the prosecution of law-suits. LDF is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties and participated as amicus curiae in various courts in numerous cases involving many facets of the law.

2. The Puerto Rican Legal Defense and Educational Fund, Inc. (PRLDEF) is a non-profit, charitable corporation incor-

porated under the laws of the State of New York. Its primary purpose is to bring lawsuits on behalf of Puerto Rican citizens to secure their constitutional and civil rights. It has been particularly active in the federal district courts in New York, as well as the appellate courts and the Supreme Court of the United States.

3. The National Legal Aid and Defenders' Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel because of their indigency. Its members include the great majority of free legal services agencies throughout the United States, as well as Public Defender offices and co-ordinated assigned counsel systems. NLADA also includes among its membership over 2000 individual members,

most of whom are private practitioners. NLADA seeks to enlist the support of the bar and the general public on behalf of equal access to legal representation and to our courts.

4. All of amici have a particular interest and concern with the protection of the rights of attorneys who are involved in representing unpopular clients and causes. See, e.g., NAACP v. Button, 371 U.S. 415 (1963); Sanders v. Russell, 401 F.3d 241 (5th Cir. 1968). Because they are often involved in representing such clients, they have particular knowledge and experience with the difficulties in obtaining local private counsel and with attempts to inhibit such representation. Therefore, they believe that their views on the important issues raised by this case will be of particular value to the Court.

WHEREFORE, for the foregoing reasons, amici pray that the attached brief be permitted to be filed.

Respectfully submitted,

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE PUERTO RICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., and THE NATIONAL LEGAL AID AND DEFENDERS' ASSOCIATION AS AMICI CURIAE

ARGUMENT

I.

THE AVAILABILITY OF A SWIFT AND EFFECTIVE REMEDY AGAINST PUNITIVE DISCIPLINARY PROCEEDINGS IS ESSENTIAL

In their motion for leave to file this brief, amici have set out their gen-

eral concern with the important issues presented by this case. In Part II of this Brief we will discuss in somewhat summary form why we believe Younger v. Harris, 401 U.S. 37 (1971), and its progeny do not bar the intervention of a federal court into state bar disciplinary proceedings under the circumstances presented by this case. Initially, we wish to explain why we believe that the availability of an immediate federal court remedy is essential in order to ensure that persons who are charged with unpopular crimes or who are seeking to vindicate their constitutional and civil rights will be able to obtain effective legal representation.

As this Court has recognized on more than one occasion, the bringing of litigation or the providing of defense to those associated with unpopular causes itself

creates a hazard to attorneys. Thus, as long ago as Powell v. Alabama, 287 U.S. 45 (1932), this Court noted the importance of defendants charged with heinous crimes and faced with an aroused community having the effective assistance of counsel, and the difficulties such defendants necessarily face in securing the same. In NAACP v. Button, 371 U.S. 415 (1963), this Court struck down state laws which would interfere with civil rights advocates obtaining effective legal representation. The Court noted the unpopularity of such causes and the unfortunate truth that most attorneys were reluctant to take them on:

> Lawsuits attacking racial discrimination at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather a one of an apparent dearth of lawyers who are willing to undertake such litigation.

371 U.S. at 443.

See also, In re Primus, 436 U.S. 412 (1978), where also, through the regulation of the practice of law, attempts were made to interfere with the constitutional rights of attorneys associated with a civil liberties organization attempting to represent those most in need.

A long history fully bears out this Court's concern and also documents the involvement of the local organized bar in many communities in seeking to interfere with or repress the activities of attorneys willing to become involved in controversial cases.[1/] During the height of the civil rights movement in the South it was not un-

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1/ Indeed, the history of the problem goes back in this country at least as far as the case of John Peter Zenger whose first attorneys were disbarred for daring to defend him against charges of criminal libel for his criticism of the colonial governor of New York.

common for the local bar, unfortunately at times with the cooperation of courts, to attempt to interfere with attorneys representing the unpopular cause of racial equality and justice. For example, in Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968), the Mississippi State Bar joined in attempting to justify rules which were ostensibly designed to regulate the practice of law, but which would have crippled the ability of attorneys associated with out-of-state civil rights organizations to provide representation in federal court. In striking down these rules the Fifth Circuit noted:

> Out of twenty-two hundred lawyers in Mississippi, only twelve are negroes. Of course, all twelve are not always available. This is obviously an inadequate reservoir. Moreover, there is ample evidence in the record to demonstrate the burdens of counsel handling such cases, . . . as well as the peti-

> tioners' inability to obtain representation, which, parenthetically, is borne out by literally hundreds of civil rights cases that have come to us in which out of state lawyers have had the laboring oar. It is no overstatement that in Mississippi and the South generally negroes with civil rights claims or defenses have often found securing representation difficult.
>
> * * *
>
> On the showing made in this case the civil rights climate in Mississippi is not unlike that of Virginia. Furthermore, in damage cases brought by negro plaintiffs against white defendants, the slight chance of contingent fee recovery does not suggest that economic benefits are or will be such as to outweigh, for appreciable numbers of Mississippi lawyers, their reluctance to become identified with the negro civil rights effort.

401 F.2d at 245. See also, Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964).

In Sobol v. Perez, 289 F. Supp. 392 (W.D. La. 1968), the district court intervened and granted an injunction against attempts, supported by the Louisiana

State Bar, to prosecute an out-of-state attorney for the unauthorized practice of law connected with his representation of the defendant in Duncan v. Louisiana, 391 U.S. 145 (1968). In holding that federal court intervention was necessary, the difficulty in finding local counsel to take such cases was noted. The district court held:

> This prosecution was meant to show Sobol that civil rights lawyers were not welcome in the parish, and that their defense of Negroes involved in cases growing out of civil rights efforts would not be tolerated. It was meant also as a warning to other civil rights lawyers and to Negroes in the parish who might consider retaining civil rights lawyers to advance their rights....

289 F. Supp. at 402.

In addition to reported cases amici can cite their own experiences and experiences of attorneys associated with them over many years. It was more than common

for local attorneys who were willing to take on representation in civil rights cases to suffer threats of discipline, disbarment, investigations, and other harassment actions that were often initiated by local bar groups or attorneys.[2/] Indeed, attorneys even suffered harassment from hostile federal court judges. See, In re Brown, 346 F.2d 903 (5th Cir. 1965).

In short, the present case cannot be viewed in isolation or as an aberration. It is rather part of a continuum of instances in which local bar groups take offense at activities which they feel are contrary to their interests and views, and therefore which they seek to supress.

2/ See, Oppenheim, "The Abdication of the Southern Bar," in Southern Justice, Friedman, Ed. (Pantheon Books, N.Y., 1965); see also, Morgan, A Time to Speak (Harper & Row, N.Y., 1964).

It is in this context that the question of the necessity for the availability of a speedy and effective remedy to protect First Amendment rights must be decided.

II.

YOUNGER V. HARRIS DOES NOT BAR FEDERAL COURT INTERVENTION HERE

In many of the cases cited above, the activity involved was direct representation and litigation in the courts. In striking down attempts to unduly regulate such activities, this Court has held that they enjoyed First Amendment status. NAACP v. Button, supra. Here, such status is even clearer. Mr. Hinds is accused of violating the code of ethics for stating views to the press on a matter of the utmost public interest, the fair administration of justice. Whether the local bar agreed or disagreed with his comments is not the

issue here. They clearly were protected by the First Amendment and just as clearly the provisions of the rules of ethics sought to be used to punish him would be unconstitutionally overbroad if they did extend to his conduct.[3/]

The issue presented by this case, therefore, is the adequacy of the remedies provided in the New Jersey system to an attorney faced with an investigation, inquiry, and possible discipline for First Amendment-protected activities. Quite simply stated, the procedures here are inadequate and the remedy is non-existent. The Supreme Court of New Jersey

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3/ It is amici's view that Mr. Hinds' actions could not be the basis for discipline even if he had been counsel of record in the criminal trial at issue here. Since he was not, it is even more apparent that his speech was immune from any adverse consequences.

itself, by modifying the rules under which such discipline is administered has essentially admitted that there did not exist a speedy and effective remedy for the protection of First Amendment rights. Such a remedy is an absolute prerequisite, of course, to the power of the state to impose any regulation that may impinge on free speech. Freedman v. Maryland, 380 U.S. 51 (1965)

Given the inadequacy of any remedy this case falls squarely within one of the recognized exceptions to the Younger doctrine, since that case is predicated on the assumption that federal rights may be fully protected in state court proceedings. Thus, in state criminal proceedings constitutional rights may be asserted and vindicated. If they may not be, either through the nature of the procedures or

because of the potential bias of the decision-maker, then Younger does not apply and immediate recourse to federal court is the right of the person affected. Gibson v. Berryhill, 411 U.S. 564 (1972).

Here, there were not only no procedures to raise and have decided constitutional issues, but it is doubtful in the extreme that the committee would have felt itself able to entertain a challenge to a code of ethics embodied in rules promulgated by the very state Supreme Court that had charged the committe to enforce them.[4/] The fact that there is an even-

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4/ This problem is by no means abstract. Amicus NAACP Legal Defense Fund was recently involved as amicus in a proceeding before the District of Columbia bar that raised this issue. An attorney had sought an opinion as to whether he could, consistent with the Code of Ethics, provide funds to finance the costs of a Title VII class action. The Fund, in its submission, raised

tual right to a review by the New Jersey Supreme Court itself does not cure these defects, Gibson v. Berryhill, supra, since First Amendment rights are of such a fundamental nature that their immediate vindication and protection must be possible. Any delay during which an attorney is under the threat of discipline or adverse consequences for their exercise can only serve to have a "chilling effect" on them.

Finally, it is clear that the proceeding before the ethics committee was prosecutorial and not adjudicative in nature, since the mandate of the committee was to decide whether to prosecute. Therefore,

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4/ continued

the issue of whether such a prohibition would violate the First Amendment in light of NAACP v. Button, supra. The Bar committee eventually decided it could not decide the latter issue since the Code of Ethics had been adopted as a rule of the court.

the analogy to the criminal law system would be to an investigation by the prosecutor to decide whether to file an information or make a presentment to the grand jury. This Court has repeatedly made it clear that comity and the Younger rule does not bar federal court intervention to protect First Amendment rights at that point. Allee v. Medrano, 416 U.S. 802 (1974).

In summary, amici urges that the decision of the court of appeals was clearly correct. The adequate protection of First Amendment rights reguires the availability of the forum of a federal court under the circumstances presented here.

Respectfully submitted,

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No. 81-460
In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

MIDDLESEX COUNTY ETHICS COMMITTEE,
Petitioner,

v.

GARDEN STATE BAR ASSOCIATION, THE NEW JERSEY ASSOCTATION OF BLACK WOMEN LAWYERS, NATIONAL CONFERENCE OF BLACK LAWYERS, and LENNOX HINDS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION OF THE NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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The NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION hereby moves for leave to file the accompanying proposed brief, as amicus curiae.

In support thereof, movant says as follows:

1. Consent to file as amicus curiae has been refused by petitioner Middlesex County Ethics Committee.

2. As more fully set forth in the Statement of Interest in the proposed brief, the National Alliance Against Racist and Political Repression, founded in 1973, is a multiracial organization composed of local branches, affiliated national organizations and individual members throughout the United States. Among its members are legal and civil rights organizations, and lawyers as well as lay people. The purpose of the organization is to work for the elimination of racist and political repression from our national life by means of activity in the fields of education, legislation and legal defense. It is particularly concerned with manifestations of racism in the criminal process.

3. Movant believes that it is of critical importance that the Court consider the impact on organizations such as amicus, in determining whether to prevent or allow an affirmative challenge to professional rules which tend to deter lawyers from speaking out on what they perceive to be ongoing racial injustice in court proceedings.

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CERTIFICATE OF SERVICE

I, Max D. Stern, hereby certify that I have served the above Motion of the National Alliance Against Racist and Political Repression For Leave to File Brief As Amicus Curiae by mailing three copies, first-class postage prepaid, to James R. Zazzali, Attorney General of New Jersey, Attorney for Petitioner, State House Annex, Trenton, New Jersey 08625 and to Morton Stavis, Attorney for Respondents, c/o Center for Constitutional Rights, 744 Broad Street, Newark, N.J. 07102

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL ALLIANCE AGAINST RACIST AND POLITCAL REPRESSION AS AMICUS CURIAE

This brief of the National Alliance Against Racist and Political Repression as Amicus Curiae is filed in support of the respondents.

THE INTEREST OF THE AMICUS

The National Alliance Against Racist and Political Repression (the Alliance), founded in 1973, is a multiracial organization composed of local branches, affiliated national organizations and individual members throughout the United States. Among its members are legal and civil rights organizations, and lawyers as well as lay people. The purpose of the Alliance is to work for the elimination of racist and political repression from our national life by means of activity in the fields of education, legislation and legal defense. It is particularly concerned with manifestations of racism in the criminal process.

The Alliance has participated as amicus in a number of cases in this and lower courts which have raised issues of racial discrimination in the criminal justice system. Fundamental to the program of the Alliance is the recognition that public scrutiny of judicial proceedings is essential to the prevention and amelioration of racist and oppressive practices. As set forth in the argument,

the bar disciplinary rules under which respondent Lennox Hinds has been charged, constitute a serious threat to the ability of all lawyers and legal organizations to call public attention even to the worst miscarriages of justice. These rules, therefore, ultimately call into question the ability of organizations such as our own to carry on an effective struggle for fairness and equality in the court system in this country. For this reason the Alliance believes that it is critical that the affirmative challenge to these rules be permitted to proceed in order to protect the rights of other lawyers, including our own members, and associations of lawyers, and ultimately, of all of us, to protest against cases of perversion of justice in the criminal process.

ARGUMENT

THE COURT SHOULD AFFIRM THE JUDGMENT OF THE COURT OF APPEALS IN ORDER TO PRESERVE THE FUNDAMENTAL FIRST AMENDMENT RIGHTS OF THE ORGANIZATIONAL PLAINTIFFS AND THOSE WHOM THEY REPRESENT.

This case is not solely about an individual attorney who, on account of his own individual actions, has been required to defend against professional charges. The prosecution of Lennox Hinds, for public statements made while National Director of a national black bar association, under regulations which are contended to be unconstitutional on their face, has profound implications for the right of all black bar associations, of which three are represented as plaintiffs in this action, and indeed the right of all black attorneys to make public protest against racial oppression in the courts.

The Garden State Bar Association, the New Jersey Association of Black Women Lawyers, and the National Conference of Blacks Lawyers, (NCBL), each has as a

primary purpose, the duty to inform the community about problems of racial discrimination in the courts and thus to effectuate our national goal of equal justice under the law. Yet, the proceeding before the Middlesex County Ethics Committee has the effect of allowing an individual white attorney to effectively still all members of these organizations from speaking out about problems of racial discrimination lest they face the professional harassment and intimidation visited upon Mr. Hinds, the then National Director of the respondent, NCBL. Given the severity and breadth of the deprivation of First Amendment rights thus implicated, amicus urges that the case is a uniquely appropriate one for the federal judiciary to determine whether the rules under which the proceedings against Mr. Hinds have been undertaken are consistent with the Constitution.

The long and tragic history of racial discrimination in the United States has, of course, had its impact on the country's courtrooms.

> "For we also cannot deny that 114 years after the close of the War Between the States. . . racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our scciety as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious." Rose v. Mitchell, 99 S. Ct. 2993, 3001 (1979)

Thus one need not cast wide aspersions in order to note this fact. Indeed, the variety and persistence of problems of racial insensitivity and bias in the judicial process has come before this Court on more than one occasion. E.g. Strauder v. West Virginia, 100 U.S. 303 (1880); Norris v. Alabama, 294 U.S. 587 (1935).

Of particular concern has been racial discrimination in the selection of juries in criminal cases, which has been recognized as striking at "the fundamental values of our judicial system", Rose v. Mitchell, supra. Such discrimination has been condemned not only because it is inherently unfair to particular black defendants, but because it is an asser-

tion of racial inferiority and a stimulant to race prejudice against all black people who seek "that equal justice which the law aims to secure to all others," Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

This Court's concern for racial fairness in the conduct of criminal cases includes not only bias in the mechanics of setting up jury panels, but also reaches insensitivity to racial issues on the part of trial judges who limit a black defendant's counsel from inquiring into posssible juror bias, a concern heightened when the defendant is a well known black activist, Ham v. South Carolina, 409 U.S. 524 (1973), or when the victim of an alleged violent crime is white and the defendant a member of a racial or ethnic minority group, c.f. Rosales-Lopez v. United States, 101 S. Ct. 1629 (1981).

The types of problems evidenced in the foregoing cases are illustrative of the nature of the concerns and purposes of the black bar associations who have

sought relief in the federal courts in this matter. Mr. Hinds, at the time of the events which led to this litigation, was the National Director of the National Conference of Black Lawyers, and was acting in his organizational capacity when he spoke out against what he perceived to be racial insensitivity and bias in the early stages of a celebrated criminal trial involving a black female activist who stood accused of the murder of a white police officer.

Yet, as can be the case, the expression of strong views on race and justice by a spokesperson for a black organization ran afoul of white sensibilities, and in this instance, the sensibilities of one Robert M. Foley, a white attorney and member of the Middlesex County Ethics Committee. Although aware that Mr. Hinds was not associated with the defense in the underlying criminal case, and without any indication, whatsoever, that Mr. Hinds had in fact hampered the course of that trial, Mr. Foley determined that action should be taken against Mr. Hinds. Mr. Foley's fellow Committee members

appointed him to investigate what amounted to his own subjective feelings that Hinds had to be disciplined for his public remarks.

Despite reviewing the matter and coming to an apparent legal conclusion that Lennox Hinds had violated no applicable rule of the New Jersey bar, (Joint Appendix 78a) Foley nonetheless recommended the filing of charges against Hinds. The sole basis for the charges, which Hinds was then expected to rebut in a subsequent hearing, was Mr. Foley's personal opinion that Hinds should not have publicly expressed his observations about potential racial bias in the criminal trial. (Joint Appendix 135(a)-136(a)).

At that stage of the proceedings, the three black bar groups and Hinds sought relief in the United States District Court. The organizations alleged that continuance of the proceedings against Hinds would have the effect of interfering with the carrying out of their program to expose racism, including "such as may be found in the legal system." (Joint Appendix 25a) It was fur-

ther alleged that the disciplinary rules were on their face and as applied violative of the First Amendment and Equal Protection Clause as overbroad and vague. Injunctive and declaratory relief was sought.

The district court, relying on the abstention doctrine of Younger v. Harris, 407 U.S. 37 (1971), refused to decide the claims presented and the question before this Court is whether that refusal was proper. An examination of the interests of the respondent bar associations and the nature of the proceedings below make clear that the Younger standard was met.

The black bar associations came before the district court much in the same posture as similar organizations facing bar disciplinary regulations threatening to inhibit their associational conduct. The leading case for analysis is NAACP v. Button, 371 U.S. 421 (1963). There the National Association for the Advancement of Colored People, the NAACP Legal Defense Fund, Inc. and the staff attorneys of these organizations stood accused of violating a state statute against the

improper solicitation of legal business. The NAACP groups and attorney members had openly advocated, informed about, and encouraged certain kinds of litigation. Indeed, this Court found that the basic aims and purposes of the NAACP were to secure the elimination of all racial barriers to equal citizenship for black citizens in the United States and that the NAACP had engaged in extensive educational, lobbying and litigation activity on behalf of that declared purpose.

The Court held that these "activities of the NAACP, its affilitates and legal staff. . . are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit under its power to regulate the legal profession, as improper solicitations of legal business." (At 428).

The Court recognized that the NAACP had a First Amendment right to engage in association for the advancement of beliefs and ideas and that its advocacy of litigation was a form of protected political expression. These First Amendment

freedoms, the Court observed, "are delicate and vulnerable, as well as supremely precious in our society." Id., at 433. Of particular relevance to the instant case was the Court's recognition that the "threat of sanctions may deter [the exercise of First Amendment rights] almost as potently as the actual application of sanctions." at 433. It further observed that "There thus inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation. . .. Lawyers on the legal staff. . . would risk . . . disbarment proceedings. ... It makes no difference whether such prosecutions or proceedings would actually be commenced. . .. We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community. . . . In such circumstances, [the broadly worded bar solicitation strictures] may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all

such activity on behalf of the civil rights of Negro citizens." Id,. at 434-436.

NAACP v. Button is relevant to the instant litigation in several regards. First, it makes clear the very important First Amendment associational and political rights which cloak the activities of the Garden State Bar Association, the New Jersey Association of Black Lawyers, and the NCBL. Second,the Court recognized the severely inhibiting potential effect on these organizations' rights as a result of the regulation in question, and particularly the vulnerability of NAACP layers to hostile white reaction which could be given license through the application of broad bar conduct regulations. 1/

1/ This Court has had further occasion to recognize and protect the First Amendment rights of lawyers and organizations in the face of solicitation regulations when the actions punished "were undertaken to express personal political beliefs and to advance the civil liberties of the ACLU, rather than to derive financial gain." In re Primus, 436 U.S. 422 (1978)

Subsequent decisions have interpreted Button as establishing the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." United Transportation Union v. Michigan Bar, 401 U.S. 576, 585 (1971) cited in In re Primus, 436 U.S. 422, 426 (1978).

The importance of the First Amendment, of course, does not turn on the importance of the substance of the protected expression. Yet it must be noted that here, the black bar associations assert not only the individual organizations' interests, but the ultimate interests of all black citizens, and indeed, all Americans in "meaningful access to the courts" and more specifically, to courts untainted by racism. For, by striking at Lennox Hinds, the Middlesex County Ethics Committee, in a very real sense, strikes at the rights of all black lawyers and their clients who pursue equal justice in our courts. If a black lawyer who dares to speak out at what his best judgment tells him is a racial

abuse of justice, must thereby risk professional punishment, then the compulsion to silence will be a strong one. The black lawyers and their bar associations, heeding the threat in Hinds' case, may likely turn a blind eye to discrimination when in occurs in New Jersey courts. In a real sense, the collective and individual rights of these lawyers to speak out about racism is, in fact, an indispensible part of the ultimate preservation of all other rights of black citizens which are daily subject to the judicial process.

Cases such as Button and Primus make manifest the fundamental nature of the organizational claims as well as the severe constitutional scrutiny appropriate at any final adjudication of the constitutionality of Disciplinary Rules DR 1-102 (A)(5) and DR 7-107 (D). These cases do not, however, squarely confront the Younger issue.

The essence of the Younger doctrine, as this Court has made clear, is that the state courts are fully competent to adjudicate constitutional claims in an on-

going state proceeding. That, however, presupposes an ongoing state proceeding. For it is a critical precondition for Younger abstention that the federal plaintiff have "a concrete opportunity to vindicate his constitutional rights," Steffel v. Thompson, 415 U.S. 452, 462 (1972), and "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

For the three bar organizations here, there is no pending or ongoing state proceeding. The investigation by the Ethics Committee as to Lennox Hinds affords no opportunity for the bar association respondents to vindicate their separate First Amendment rights of association and political expression. Yet for the lawyer-members of these organizations, the threat of prosecution "cannot be characterized as 'imaginary or speculative.'" Steffel, supra at 458.

One black lawyer has already been imperiled by running afoul of the sensibilities of the Ethics Committee, and

particularly, Robert Foley. All black lawyers may now fear that they are at the mercy of any white colleague whom they offend by decrying perceived injustice in the courts. In such circumstances, the organizational plaintiffs are entitled to look to the federal courts for a timely determination of whether the New Jersey Disciplinary Rules can be used in such an inhibiting manner without offending the First and Fourteenth Amendments. 2/

2/ Nor should it be argued that individual black attorney members of the three bar associations should wait until they too are charged with violating the Disciplinary Rules. Even assuming, arguendo, that the Ethics Committee procedure amounts to the kind of meaningful state court adjudication contemplated in a Younger situation, no other black lawyer should be made to run the risk of "the Scylla of intentionally flouting the state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a [criminal] proceeding." Steffel, supra at 462. Steffel is also instructive in that one of the federal plaintiffs there was the Atlanta Mobilization Committee, the organization for whom the state court defendants were leafletting when they were criminally prosecuted. This fact did not, however,

Finally, the concept of "derivative preclusion" should have no bearing on this case. In Doran v. Salem Inn, 422 U.S. 923, 927 (1975) three plaintiff topless bars which were "represented by common counsel, and [had] similar business activities and problems" sought to enjoin an ordinance under which one of the plaintiffs had been criminally charged. Nonetheless, despite similarity between the plaintiffs the Court found dispositive the fact that the three bars "are apparently unrelated in terms of ownership, control and management," supra at 929. There is no basis in the record to assert that the Garden State Bar Association, the New Jersey Association of Black Women Lawyers and the NCBL share any kind of joint ownership, control or management. While each organization is deeply committed to the elimination of racism in our society, each organization pursues that goal according to its own beliefs and decisions.

(2/ continued)
lead to the invocation of Younger abstention.

Indeed, it would appear obvious that the nexus between a lawyer and a bar association does not present the kind of "management or control" situation which may take place in an employer-employee business type of relationship.

Furthermore, the fact that Hinds was the National Director of the NCBL affords no further basis for derivative preclusion. The NCBL has its own First Amendment associational rights which are unique to it and distinct from Mr. Hinds' own right to express his opinions. Moreover, the charges against Mr. Hinds might well be dismissed as unproven or withdrawn upon further reflection. Such an outcome, while relieving Mr. Hinds from jeopardy on the complaint against him, would still leave all other members of the three associations under a cloud of doubt as to the constitutional validity of the Disciplinary Rules which had been used to threaten Hinds.

In view of the fundamental importance of the First Amendment rights involved, these bar organizations can only look to the federal court for a timely

opportunity to adjudicate their interests. Nothing articulated in the Younger case counsels to the contrary.

CONCLUSION

For the reasons set forth above, the judgment of the Third Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Max D. Stern, hereby certify that I have served the above brief of the National Alliance Against Racist and Political Repression, as amicus curiae, by mailing three copies, first class postage prepaid, to James R. Zazzali, Attorney General of New Jersey, Attorney for Petitioner, State House Annex, Trenton, New Jersey 08625, and to Morton Stavis, Attorney for Respondents, c/o Center for Constitutional Rights, 744 Broad Street, Newark, New Jersey 07102.

Max D. Stern

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